No. 88-7247-CSY
Status: GRANTED
CAPITAL CASE

Title: Bryan Stuart Lankford, Petitioner
v.
Idaho

Docketed:
May 19, 1989

Court: Supreme Court of Idaho

Counsel for petitioner: Fisher,Joan Marie

Counsel for respondent: Thomas,Lynn E.

Entry	Date	Note	Proceedings and Orders
1	May 5 1989	D	Application (A88-881) for a stay of execution of sentence of death, submitted to Justice O'Connor.
2	May 10 1989		(A88-881) DISTRIBUTED. May 11, 1989.
3	May 11 1989		Application (A88-881) referred to the Court by Justice O'Connor.
4	May 11 1989		(A88-881) The application for stay of execution of sentence of death presented to Justice O'Connor and by her referred to the Court is granted pending the timely filing and disposition by this Court of a petition for writ of certiorai. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certioria is granted, this stay shall continue pending the issuance of the mandate of this Court.
5	May 19 1989	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
7	Jul 11 1989		Brief of respondent Idaho in opposition filed.
8	Jul 13 1989		DISTRIBUTED. September 25, 1989
9	Aug 17 1989		Record requested.
10	Aug 22 1989	X	Reply brief of petitioner Bryan S. Lankford filed.
11	Sep 5 1989		Record filed.
		*	ID Supreme Court-17vol
12	Mar 5 1990		REDISTRIBUTED. March 16, 1990
13	Jun 1 1990		REDISTRIBUTED. June 7, 1990
15	Jun 8 1990		REDISTRIBUTED. June 14, 1990
17	Jun 15 1990		REDISTRIBUTED. June 21, 1990
19	Jun 22 1990		REDISTRIBUTED. June 27, 1990
21	Sep 12 1990		Supplemental brief of petitioner Bryan S. Lankford filed.
22	Sep 17 1990		REDISTRIBUTED. September 24, 1990
24	Sep 28 1990		REDISTRIBUTED. October 5, 1990
26	Oct 9 1990		REDISTRIBUTED. October 12, 1990—
28	Oct 15 1990		Petition GRANTED. limited to Question II presented by the petition.
			**********
29	Dec 3 1990		Joint appendix filed.
31	Dec 4 1990		Brief of petitioner Bryan S. Lankford filed.
32	Dec 17 1990		SET FOR ARGUMENT TUESDAY, FEBRUARY 19, 1991. (3RD CASE)
33	Dec 28 1990		Brief of respondent Idaho filed.
34	Jan 10 1991		CIRCULATED.
35	Feb 7 1991	X	Reply brief of petitioner Bryan S. Lankford filed.
36	Feb 13 1991		Record filed.
		*	USDC-one vol.
37	Feb 19 1991		ARGUED.

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ORIGINAL

No. 88-7247

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

BRYAN STUART LANKFORD,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46.1 of the Rules of this Court, motion is hereby made that Petitioner be allowed to proceed in forma pauperis. Petitioner's affidavit is attached to this motion. Leave to proceed in forma pauperis was sought and obtained in all courts below.

Dated this 18th day of May, 1989.

JOAN MARIE FISHER
Attorney for Petitioner

Joan Marie Fisher
JOAN MARIE FISHER

15P

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 88-7247

ORIGINAL

BRYAN STUART LANKFORD,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

STATE OF IDAHO)
) ss
County of Ada)

I, BRYAN STUART LANKFORD, being first duly sworn, depose and say that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fee, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No.

The date of my last employment was May, 1983.

The amount of salary and wages I received per month was less than $ 1,000.00.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? I.D.O.C., $50.00.

3. Do you own any cash or checking or savings account? No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

BRYAN STUART LANKFORD

SUBSCRIBED AND SWORN to before me this 25th day of April, 1989.

Notary Public in and for the State of Idaho, residing at Genesee, Idaho

file
correct copy

No. 88-7247

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ATTORNEYS FOR PETITIONER

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the Idaho death penalty statute violates the Sixth Amendment because it deprives a defendant of the right to a jury trial on the factual elements of capital murder?

2. Whether a death sentence violates the Sixth, Eighth and Fourteenth Amendments when it is imposed by a trial judge after the prosecutor has notified the defendant in writing, pursuant to court order, that the state would not seek the death penalty, and defense counsel, relying on the written notice, has made no argument and presented no evidence relating to the statutory aggravating factors or the appropriateness of imposing the death penalty?

3. Whether a sentence of death violates the Sixth, Eighth, and Fourteenth Amendments where it is based in part on unsworn, unreliable extrajudicial statements considered without any confrontation or cross-examination?

4. Whether Idaho's death penalty statute violates the Eighth and Fourteenth Amendments by requiring a death sentence to be imposed unless the defendant establishes the existence of mitigating factors sufficient to "make unjust the imposition of the death penalty"?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

BRYAN STUART LANKFORD,

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v.

STATE OF IDAHO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

Petitioner Bryan Stuart Lankford respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Idaho affirming his sentence of death.

OPINIONS BELOW

The original opinion of the Idaho Supreme Court affirming Petitioner's death sentence was reported at 113 Idaho 688, 747 P.2d 710 (1987) and is attached as Appendix A. This Court granted a Petition for Writ of Certiorari in Lankford v. Idaho, 486 U.S.--, 108 S.Ct. 2815 (1988) and vacated the judgment and remanded to the Idaho Supreme Court for reconsideration in light of Satterwhite v. Texas, 486 U.S. --, 108 S.Ct. 1792 (1988).

The Idaho Supreme Court's opinion on remand, reaffirming its prior decision, has not as yet been printed in the official reports, and is attached as Appendix B.

JURISDICTION

The opinion of the Idaho Supreme Court on remand from this Court was issued on April 4, 1989. Appendix B. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), Petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States.

U.S. Const., Amend. VI (excerpt):

> "In all criminal prosecutions, the accused shall enjoy the right to a...trial, by an impartial jury... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him;...and to have the assistance of counsel for his defense."

U.S. Const., Amend. VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const., Amend XIV (excerpt):

> "No State shall...deprive any person of life...without due process of law..."

This case further involves Idaho's statutory homicide and capital punishment scheme. These include Idaho Code §§ 18-4001, 18-4002, 18-4003(d), 19-2515, and 19-2516. These provisions are lengthy and are therefore included in Appendix C.

STATEMENT OF THE CASE

Petitioner Bryan Stuart Lankford was charged with two counts of murder during the perpetration of a felony, which is defined as murder in the first degree under Idaho Code § 18-4003(d). Upon a plea of not guilty, Petitioner was tried by jury before the Hon. George Reinhardt, III, of the Second Judicial District Court, in Idaho County, Idaho.

The primary evidence of the killings came from Petitioner's statements to police and his testimony at trial. Petitioner confessed and testified he participated in robbing the homicide victims, Robert and Cheryl Bravence, who were camping in rural Idaho. During the robbery, Petitioner's older brother (and later co-defendant) Mark Lankford hit each victim across the back of the head or neck, two to three times with a nightstick. Petitioner, who believed the robbery victims to be unconscious, helped move them from the original campsite. At a more remote area, Mark Lankford removed the couple from a van and carried them into the woods. Petitioner testified he did not know or believe that the Bravences were dead at the scene of the robbery, and that he did not intend to kill, plan to kill or engage in any conduct that was intended to result in serious bodily injury or death to the couple. Circumstantial evidence generally confirmed the sequence of events as described by Petitioner in his statements and trial testimony.

The jury was instructed that the required element of "malice" is implied when "the killing is a direct and casual [sic] result of perpetration or attempt to perpetrate a felony inherently dangerous to human life, specifically in this case robbery." R. Vol. II, p. 264. The jury was also instructed under the Idaho law of principals, specifically that "it is therefore not necessary that the State prove that this defendant actually committed the act which caused the death of the victims, provided the State prove beyond a reasonable doubt the defendant was present, and that he aided and abetted in the commission of the crime of robbery as alleged." (R. Vol. II, p. 270.) The jury was further

instructed that the State need not prove that the killing was intentional, but only that a human being was killed by any one of several persons engaged in the perpetration of the crime of robbery. R. Vol. II, p. 272. A requested jury instruction on Petitioner's specific intent was refused, and that issue was withheld from the jury. R. Vol. II, p. 242. Based upon those instructions, the jury returned a verdict of guilty of first degree felony murder on both counts. R. Vol. II, pp. 244, 250.

Following the jury verdicts, but before sentencing, Petitioner was called as a witness for the prosecution at the trial of Mark Lankford, which was conducted separately before Judge Reinhardt. Upon advice of counsel, Petitioner refused to testify, claiming his Fifth Amendment right not to incriminate himself. Consequently, the State entered into an immunity agreement with Petitioner, which was approved by Judge Reinhardt.

Under this immunity agreement, Petitioner testified for the State of Idaho against the Mark Lankford. Petitioner's testimony was the only direct testimony of the manner in which the killings were committed, and supported the State's theory that Mark Lankford instigated the robbery, assaulted the victims during the robbery and committed the killings. Petitioner's testimony also provided details of Mark Lankford's activities following the robbery up to and including his arrest, which were not otherwise available to the prosecution. In all, Petitioner's testimony at Mark Lankford's trial comprised over 200 pages of transcript. Mark Lankford was convicted of two counts of first degree murder.

After the verdict in Mark Lankford's trial, but prior to Petitioner's sentencing, the trial court entered an order requiring the State to notify the Court and Petitioner's counsel in writing whether the State would be seeking and recommending the death penalty, and to specify any statutory aggravating factors upon which the State would rely to support the death

penalty.[1] The State filed a written response, replying:

> In relation to the above-named Defendant, Bryan Stuart Lankford, the State through the prosecuting attorney, will not be recommending the death penalty as to either count of First Degree Murder...

Appendix D (emphasis in original). No statutory aggravating factors were stated. Ibid.

After this notice was filed, Judge Reinhardt appointed new counsel to serve as co-counsel for Petitioner at sentencing. (Tr. M.N.T., pp. 6-11). A Motion to Dismiss Trial Counsel filed by Petitioner's newly-appointed counsel on the basis of ineffective assistance was granted. (Tr. M.N.T. p. 16.) Sentencing counsel had not heard the testimony at trial nor was a transcript of the trial available. (R. Trial, Vol. II, pp. 381, 389.) A Motion for Continuance of the sentencing hearing was filed on the grounds of new counsel's unfamiliarity with the prior proceedings and the request for a transcript of those proceedings. (R. Trial, Vol. II, pp. 356, 381, 388, 389). The Motion was denied. (Tr. M.N.T. p. 215).

Shortly thereafter, Petitioner was called as a witness at a hearing on a Motion for New Trial filed by Mark Lankford. Upon advice of counsel, Petitioner refused to testify. Judge Reinhardt reaffirmed the previous immunity agreement, ordered Petitioner to testify and specifically advised Petitioner and his counsel that the testimony would be used solely for purposes of the Mark

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[1] The order stated in part:

> (5) That on or before June 18, 1984, the State shall notify the Court and the Defendant in writing as to whether or not the State will be seeking and recommending that the death penalty be imposed herein. Such notification shall be filed in the same manner as if it were a formal pleading;
>
> (6) That in the event the State shall seek and recommend to the Court that the death penalty be imposed herein the following shall be filed with the Court on or before June 18, 1984:
>
> (a) The State shall formally file with the Court and serve upon counsel for the Defendant a statement listing the aggravating circumstances enumerated in Idaho Code Section 19-2515(f) that it intends to rely upon and prove at the sentencing hearing to justify the imposition of the death penalty;
>
> (b) The Defendant shall specify in a concise manner all mitigating factors which he intends to rely upon at the time of the sentencing hearing.

Appendix D, p. 2.

Lankford's Motion for New Trial and for no other purpose. Tr M.N.T. #20158, p. 14, lines 3-8. Petitioner then testified that pending sentencing, he had become depressed and was persuaded by his brother Mark Lankford to call a local newspaper and admit to having committed the killings himself when Mark Lankford was not present. In his testimony, Petitioner denied the truth of the story told to the newspaper and reiterated the version of events to which he had previously testified. This testimony undermined Mark Lankford's Motion for New Trial, and that motion was denied.

On October 12, 1984, a sentencing hearing was held. At the hearing, the prosecuting attorney did not present any evidence of aggravating circumstances. Consistent with its written notice, the State did not seek or recommend the death penalty but rather urged the minimal sentence available -- indeterminate life. (Tr. M.N.T. p. 317.) Petitioner's counsel argued only factors which might influence the trial court's decision between a determinate life sentence (without possibility of parole) and an indeterminate life sentence. (Tr. M.N.T. p. 318-330.)

Judge Reinhardt disregarded the State's position, and despite lack of notice to Petitioner, sentenced Petitioner to death. Appendix E. The court's sentencing order found five statutory aggravating circumstances under Idaho Code 19-2515(f)--all based, in whole or in part, on the facts of the offense adduced at trial.

> (a) At the time the murder was committed, the Defendant also committed another murder...;
>
> (b) the murders were especially heinous, atrocious or cruel, and manifested exceptional depravity...;
>
> (c) by the murder, or circumstances surrounding its commission, the Defendant exhibited an utter disregard for human life...'
>
> (d) ...the murders were defined as murder of the first degree by Idaho Code § 18-4003(d) and the murders were accompanied with the specific intent to cause the deaths...;
>
> (e) the defendant, by prior conduct and by conduct in the commission of the murders at hand has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

Appendix E, at 3-4.

The evidence which the trial court cited in support of its findings of the aggravating factors was based on the trial testimony Petitioner's counsel had not heard or seen, the

immunized testimonies by the Petitioner in Mark Lankford's case, and hearsay information contained within the court-ordered presentence investigation (PSI). Information in the PSI was not limited to admissible evidence, but derived from unsworn, uncross-examined statements including: Houston, Texas, police offense reports of a 1980 robbery which was Petitioner's only prior felony conviction; statements by an inmate of Idaho County jail regarding an argument he had with Petitioner; and an unsworn statement by Mark Lankford accusing Petitioner of the Bravence robbery and killing, prepared for Mark Lankford's separate presentence investigation and sentencing.

In its "Reasons Why the Death Penalty Was Imposed", the trial court explicitly relied on this hearsay information, in part as follows:

> Bryan Lankford has floated from job to job and has in the past associated with undesirable individuals. He has no significant ties to any community or any individuals and his pattern of living clearly indicates that he will continue a life of criminal activity. Bryan Lankford was adjudged guilty of Robbery in 1980 and was placed on probation for 10 years. Finally, after being convicted of two counts of 1st degree murder, and while awaiting sentencing, the Defendant became involved in an altercation with, and threatened the life of, a fellow inmate in the Idaho County Jail.

Appendix E-7.

> Had Bryan Lankford been placed in prison for Robbery of the Safeway store the Bravences would be alive today. We cannot however fault the Texas judicial system for giving Bryan Lankford a chance to better himself and for giving him an opportunity to prove that he could be a productive citizen. At the time he was placed on probation he had a minor criminal record. He blamed all his troubles on his father's cruel treatment towards him and the bad influence that his brother had on him. Furthermore, his family supported him. Perhaps the reason that our judicial system is credible and viable is because a first time offender who threatens the life of an innocent Safeway clerk can be placed on probation and given a chance.

Ibid. The trial court's sentencing order also specifically relied on Petitioner's testimony in Mark Lankford's case, which was given under immunity. Id. at E-8.

After sentencing, pursuant to Idaho's consolidated capital

appellate procedure,[2] Petitioner filed a Petition for Post Conviction Relief. In that Petition he argued, among other things, that the sentence had been imposed in violation of the United States Constitution as a result of the "trial court's imposition of the death penalty despite the State's written notice that the State would not seek the death penalty." The Petition for Post Conviction Relief was denied.

On appeal, the Idaho Supreme Court affirmed Petitioner's conviction and sentence. State v. Lankford, 113 Idaho 688, 695, 747 P.2d 710 (1987); Appendix A. Justice Huntley of the Idaho Supreme Court concurred specially, adhering to his opinion that the United States and Idaho Constitution guarantee a right to jury trial in the sentencing of capital cases. Id. at A-9. Justice Bistline concurred only in affirming the verdict and dissented on these and other grounds. Id. at A-9.

Following the Idaho Supreme Court's affirmance, Petitioner's Petition for Writ of Certiorari was granted by this Court and the judgment was vacated and the case remanded for further consideration in light of Satterwhite v. Texas, 486 U.S.--- (1988). Lankford v. State, 486 U.S.--, 108 S.Ct. 2815 (1988). After the remand, the Idaho Supreme Court entered an "Order on Mandate of the United States Supreme Court" which vacated the Remittitur and reasserted jurisdiction of the appeal.

In its opinion on remand, in a three/two decision, the Idaho Supreme Court again affirmed Petitioner's sentence. Appendix B.

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[2] Idaho law provides for an expedited appellate procedure for capital cases. The post-conviction action must be brought before direct appeal, within 90 days of the imposition of sentence, and is the only state post-conviction action available, absent a showing of good cause. I.C. Section 19-2719.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. In the original appeal, Petitioner argued that the lack of jury participation in the resolution of the factual issues prerequisite to sentencing violated the Sixth, Eighth and Fourteenth Amendments of the United States Constitution. Defendant's Amended Brief, pp. 137-139. The Idaho Supreme Court summarily rejected the argument. Appendix A-5. On remand, the Idaho Supreme Court granted Petitioner permission to file a Third Supplemental Brief on this issue, in light of a Ninth Circuit decision in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc). Appendix F. Accordingly, Petitioner again argued the jury issue with particular focus on the Adamson opinion. Defendant's Third Supplemental Brief, pp. 2-17. However, in its opinion on remand, the Idaho Supreme Court refused to address the issue, noting it had been previously decided. Appendix B-8.

2. Immediately following the imposition of the death penalty, Petitioner's counsel filed a Petition for Post Conviction Relief wherein she argued that the imposition of the death penalty by the trial court, despite the State's written notice that it would not seek or recommend the death penalty, violated the Defendant's right to Due Process under the Fourteenth Amendment to the United States Constitution. The issue was also raised on appeal. Defendant's Amended Brief, pp. 127-135. The Idaho Supreme Court rejected the argument on its merits. Appendix A at A-5.

3. At trial, Petitioner requested a formal sentencing hearing. On appeal, he specifically argued that the consideration of hearsay in the form of unsworn, uncross-examined testimony at sentencing in a capital case is unconstitutional under the Eighth and Fourteenth Amendments of the United States Constitution and that it violated Defendant's right to confrontation and cross-examination recognized, among other places, in Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), cert. denied 464 U.S. 1003 (1983). Defendant's Amended Brief, pp. 141-144. The

argument was rejected on its merits. Appendix A-5.

4. While Petitioner's first Petition for writ of Certiorari was pending, the Eleventh Circuit Court of Appeals rendered its decision in Jackson v. Dugger, 837 F.2d 1469 (11th Cir.) cert. denied, 108 S.Ct 2005 (1988), holding that a jury instruction that death was presumed to be the appropriate penalty skewed the jury's discretion in favor of death, contrary to the Eighth Amendment. On remand from this Court, and the reassertion of jurisdiction of the appeal in this case by the Idaho Supreme Court, Petitioner raised and argued the unconstitutionality of the Idaho death penalty statute as creating an impermissible presumption of death and unconstitutionally shifting the burden of proof at sentencing from the state to the defendant. Supplemental Brief of Appellant, pp. 36-39. Petitioner reiterated this argument in his Third Supplemental Brief of Appellant filed in light of Adamson v. Ricketts, by leave of the Idaho Supreme Court granted after Adamson. Appendix F; Third Supplemental Brief of Appellant, pp. 17-25. However, the Idaho Supreme Court's opinion on remand did not explicitly address the issue. Appendix B.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE IDAHO SUPREME COURT AND THE NINTH CIRCUIT COURT OF APPEALS REGARDING THE ISSUE OF WHETHER THE SIXTH AMENDMENT GUARANTEES A DEFENDANT THE RIGHT TO A JURY DETERMINATION OF THE STATUTORY AGGRAVATING FACTORS AS ELEMENTS OF THE OFFENSE OF "CAPITAL MURDER."

In its recent decision in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (en banc), the Ninth Circuit effectively rendered unconstitutional the Idaho death penalty statute. Adamson held that Arizona's death penalty statute, in which the trial judge is the sole authority to make factual determinations regarding the existence of aggravating circumstances, was unconstitutional under the Sixth and Fourteenth Amendments. 865 F.2d at 1023-29. The Adamson court reasoned that the statute erroneously labeled elements of the offense as sentencing factors and deprived the Defendant of a right to a jury trial on the elements of capital

murder. Adamson v. Ricketts, 865 F.2d at 1026.

A narrow majority of the Idaho Supreme Court has rejected the holding in Adamson and held that it was not unconstitutional "for a judge, instead of a jury, to determine whether any of the aggravating circumstances listed in the statute exist." State v. Charboneau, Nos. 16339/16741 Supreme Court of Idaho, 1989 Ida. Lexis No. 53, April 4, 1989, as amended April 18, 1989 at p. 29. Two Justices of the Idaho Supreme Court dissented from this holding, finding the reason and rule of Adamson to be persuasive, and noting that "[t]he Idaho sentencing procedure under I.C. § 19-2515 is virtually identical in all material respects to the defective Arizona schemes." Id. at 46 (Huntley, J. dissenting); see also, Charboneau at 72 (Bistline, J. dissenting).

This is a direct and obvious conflict between the Supreme Court of Idaho and the Ninth Circuit. Other courts have similarly split on the issue. Courts in the other judge-sentencing states of Arizona, Nebraska and Montana have agreed with the Idaho Supreme Court;[3] but the Supreme Court of Oregon has held with the Ninth Circuit and struck down a previous death penalty statute for this reason, though primarily on state constitutional grounds. See State v. Quinn, 623 P.2d 630 (Ore. 1988).

This division among these lower courts involves an issue of the utmost importance. The Idaho Supreme Court's majority would restrict "the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts and the court as to the law," United States v. Battiste, 2 Sumner 240, 243 (1835) (Story, J.), contrary to centuries of English and

[3] See Harper v. Grammer, 654 F.Supp. 515 (D. Neb. 1987); State v. Smith, 665 P.2d 995, 1000 (Ariz. 1983); State v. Creech, 670 P.2d 763 (Id. 1983); Fitzpatrick v. State, 638 P.2d 1002, 1012 (Mont. 1981).

American jurisprudence.[4] The Ninth Circuit's Adamson decision would invalidate the death sentencing statutes of four states. See Brief of the States of Idaho, et al., Amicus Curiae, Ricketts v. Adamson, No. 88-1553 at 1. Certiorari should be granted here to resolve this conflict.

II.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE STATE COURT'S DECISION APPROVING A DEATH SENTENCE IMPOSED AFTER DEFENSE COUNSEL PRESENTED NO EVIDENCE OR ARGUMENT AGAINST IMPOSITION OF THE DEATH PENALTY IN RELIANCE ON THE STATE'S WRITTEN NOTICE THAT THE DEATH PENALTY WOULD NOT BE SOUGHT.

The death sentence in this case was imposed through an extraordinarily unfair proceeding: the trial judge imposed that sentence sua sponte, although no evidence was offered by the prosecution in support of any aggravating factor, and no argument was made by the State in support of such a sentence. Prior to sentencing, the defense had been notified in writing, pursuant to court order, that the State would not be seeking or recommending the death penalty, and would not put on evidence of statutory aggravating factors to support the death penalty.

As a result, Petitioner's counsel was unaware that the death sentence was even at issue when she appeared at sentencing on Petitioner's behalf. Indeed, counsel was affirmatively misled into believing the death penalty--and the statutory aggravating and mitigating circumstances that would control the decision whether or not to impose the death penalty--were not at issue at that proceeding. Counsel had neither heard nor read the trial evidence that was used by the court to make its findings in aggravation; she had neither the ability nor the reason to address those facts as they could have influenced the sentencing court under the Idaho death penalty statute.

[4] This was the accepted rule by the Seventeenth Century: "Ad quaestionem facti non respondent Judices, ad quaestionem legis non respondent Juratores." See Forsyth, History of Trial by Jury 259 (1852); see Bushell's Case, 6 Howard State Trial 999, Vaughn's Rep. 135, 149 (1670). It has been called "the fundamental maxim acknowledged by the Constitution." Scott, Trial By Jury and the Reform of Civil Procedure, 31 HARV. L. REV. 669, 679 (1918). Accord, Maxwell v. Dow, 176 U.S. 581, 609 (dissenting opinion of Mr. Justice Harlan); 4 BLACKSTONE'S COMMENTARIES 350 (Louis Ed. 1900); THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 185 (1898).

Relying on the written notice filed by the prosecution, Petitioner's counsel argued only factors that she thought would influence a decision between determinate and indeterminate life sentences. Counsel did not attempt to rebut any of the statutory aggravating circumstances relevant to a death sentence since none were presented or argued by the State. Nor did counsel argue or present evidence of the mitigating circumstances necessary to outweigh the aggravating factors. The death penalty was not mentioned in argument by either the State or defense. (Tr. M.N.T., p. 317). This is a basic denial of due process under any standard.

In Gardner v. Florida, 430 U.S. 349, 358 (1977), this Court held:

> It is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even if the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding in which he is entitled to the effective assistance of counsel. Mempa v. Rhay, 389 U.S. 128; Specht v. Patterson, 386 U.S. 605. The Defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may not have a right to object to a particular result of the sentencing process.

438 U.S. at 358. Since Gardner, it has been clear that the "...fundamental principles of procedural fairness apply with no less force at the penalty phase of any criminal trial." Presnell v. Georgia, 439 U.S. 14, 16 (1978). At the core of this right to procedural due process is the "guarantee of an opportunity to be heard and its corollary, a promise of prior notice." L. Tribe, American Constitutional Law, pp. 550-51 (1978). The Sixth Amendment similarly includes a special requirement of notice of the nature of the charges in criminal prosecutions. Givens v. Housewright, 786 F.2d 1378 (9th Cir. 1986).

"A person's right to reasonable notice of the charge against him and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence." In re Oliver, 333 U.S. 257, 273 (1948). Due process requires notice which includes disclosure of "the specific issues [the defendant] must meet." In re Gault, 387 U.S. 1, 33-34 (1967). A defendant is entitled to know the factual material on which the [decision

maker]...relies for decisions so that he may rebut it." Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 288 n.4 (1974). See also, In re Ruffalo, 390 U.S. 544 (1968).

Courts in other states have held that a lack of notice of the evidence to be submitted at a capital sentencing trial is fundamentally unfair.[5] See e.g., People v. Walker, 222 Cal. Rtpr. 169, 180 (1985); Wright v. State, 335 S.E. 2d 857, 863-864 (Ga. 1985); State v. Hamilton, 478 So. 2d 123, 129 (La. 1985); Greene v. State, 713 P.2d 1032, 1038 (Ok. 1985) (dictum).

The proceedings here go beyond a lack of notice to an affirmative misleading of counsel. Cf. Raley v. Ohio, 360 U.S. 423, 438-439 (1959). The misleading notice caused counsel to forego evidentiary development and argument which focused on the critical death penalty issues and, thereby, deprived Petitioner of his right to effective counsel, "the opportunity to participate fully, and fairly in the adversary factfinding process." Herring v. New York, 422 U.S. 853, 858 (1975).

Under the circumstances here, counsel was no more able to perform her duty than was counsel in Gardner who had no notice or knowledge of the information upon which the court relied for sentencing. See Gardner v. Florida, supra. The result is no less unconstitutional.

Certiorari is appropriate and necessary here to resolve the substantial conflict between the decision of the state court below and this Court's controlling precedents and the decisions of other courts recognizing the basic rules of procedural fairness abandoned in this case.

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[5] Other courts have also held that a trial judge has no authority to interfere with the discretion of the prosecutor in its determination not to seek the death penalty, State v. Murphy, 555 P.2d 1110, 1112 (Ariz. 1976), and that the lack of notice to a defendant of the statutory aggravating factors upon which the state will rely to support a death penalty bars the sentencer from imposing the death penalty. State v. Timmon, 469 A.2d 46, 51 (N.J. 1983).

III.

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE COURT BELOW AND THE LOWER FEDERAL COURTS REGARDING THE RIGHT TO CONFRONTATION OF WITNESSES AT THE PENALTY PHASE OF A CAPITAL CASE.

In Mullaney v. Wilbur, 421 U.S. 684, 698 (1978), this Court stated:

> Where proof of specified facts may determine whether a Defendant will live or die, the constitutional requirements for the procedure controlling the proof cannot depend on the state's choice of the stage of the litigation at which the proof is to occur. If, as here, the determination of certain statutorily defined facts "may be of greater importance than the difference between guilt or innocence from any lesser crimes," the state cannot avoid the constitutional requirements for proof of those facts "by characterizing them as factors that bear solely on the extent of punishment."

Id.

In Woodson v. North Carolina, 428 U.S. 280, 305 (1976), this Court held that the capital sentencing is qualitatively different from other sentencing proceedings and therefore has a need for special reliability. In that case, this Court stated:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment however long. Death, in its finality, differs more from life imprisonment than a 100 year term differs from one only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, supra at 305.

Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982) applied these principles to find a right of confrontation at the sentencing phase of capital cases:

> [T]he focus of [the United States Supreme] Court's current capital sentencing decisions has been toward minimizing the risk of arbitrary decision making. [Citations omitted]. Whereas earlier cases had focused on the quantity of information before the sentencing tribunal, recently the court has shown greater concern for the quality of such information. Gardner v. Florida, 430 U.S. at 359, 97 S.Ct. at 1205. Thus, it has recognized the defendant's interest both in presenting evidence in his favor, Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed 2d 1 (1982); Lockett v. Ohio, supra, and in being afforded the opportunity to explain or rebut evidence offered against him. Gardner v. Florida, 430 U.S. at 263, 97 S.Ct. at 1207. Reliability in the fact finding aspect of sentencing has been a cornerstone of these decisions. Id. at 359-60, 362, 97 S.Ct. at 1205; Woodson v. North Carolina, 428 U.S. at 305, 96 S.Ct. at 2191.
>
> . . . .
>
> [T]he Supreme Court's emphasis in Gardner and other capital sentencing cases on the reliability of the fact-finding underlying the decision whether to impose the death penalty convince us that the right to cross-examine adverse witnesses applies to capital sentencing hearings. The Supreme Court has recognized cross-examination as "the greatest legal engine ever invented for the discovery of truth." California v. Greene, 399, U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed. 2d. 489 (1970) (quoting 5 J. Wigmore, Evidence, section 1367 (3rd Ed. 1940)).[fn]

Proffitt v. Wainwright, 683 F.2d at 1253.[6] Accord, Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), aff'd, 451 U.S. 454 (1981); Arnett v. Ricketts, 655 F. Supp. 1437 (Ariz. 1987).

Idaho's system conflicts markedly with these principles. Its statutory scheme--as interpreted by the Idaho Supreme Court and followed in this case--allows the sentence of death to be predicated upon rampant hearsay and other incompetent and unreliable evidence. State v. Creech, 105 Idaho 362, 368, 670 P.2d 463 (1983). See also, id. 105 Idaho at 378 (Huntley, J. dissenting). In this case, safeguards purportedly in place to assure the integrity of the sentencing procedure were nonexistent. Petitioner's counsel made a timely and appropriate motion for a formal hearing through "live witnesses" under Idaho Code § 19-2516. Nonetheless, in sentencing Petitioner to death the trial court considered the following hearsay information as a part of its pre-sentence investigation:

1. Mark Lankford's self-serving version of the robbery/homicide, given without oath or cross-examination for purposes of his presentence interview.

2. The opinions of the pre-sentence investigator on the credibility of Petitioner.

3. The complete file of Petitioner's Harris County, Houston, Texas, robbery conviction, which included within it a Houston police department offense report reciting the purported events of the robbery and conviction.

4. A motion to revoke probation filed on the 21st day of

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[6] The connection between the confrontation right and the reliability of the result was recognized well before Proffitt.

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the custodial right of confrontation, and helps assure the accuracy of the fundamental requirement for the kind of fair trial which is this country's constitutional goal. Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal process. But its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined.

Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (citations omitted) (emphasis in original).

June, 1983, in Harris County, Houston, Texas, alleging violation of conditions by Petitioner.

5. A statement by a fellow inmate in the Idaho County Jail, who alleged that he and Petitioner were in a physical altercation during Petitioner's pretrial incarceration.

The decision of the Idaho Supreme Court affirming that sentence conflicts directly with that of the Eleventh Circuit in Proffitt, and the other courts cited above. It raises a fundamental question about the requirement of reliability in capital sentencing proceedings consistently espoused by this Court. This Court should grant the Writ sought to resolve these conflicts and reaffirm that principle.

IV.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE STATE OF IDAHO AND THE NINTH CIRCUIT WHETHER THE IDAHO DEATH PENALTY STATUTE CREATES AN UNCONSTITUTIONAL PRESUMPTION OF DEATH UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Adamson v. Ricketts, supra, the Ninth Circuit also held the Arizona death penalty statute unconstitutional because it impermissibly placed the burden to prove sufficient mitigation on the defendant and thus imposed a presumption that death is the appropriate penalty. 865 F.2d at 1041-44. Adamson found that "a presumption of death conflicts with the requirement that a sentencer have discretion when faced with the ultimate determination of what constitutes the appropriate penalty." 865 F.2d at 1042.

Similarly, a panel of the Eleventh Circuit in Jackson v. Dugger, 837 F. 2d 1469, 1473-74 (11th Cir. 1988), held constitutionally impermissible a jury instruction which advised the jury that if it found an aggravating factor to exist, death resulted unless it was overridden by mitigating circumstances. Jackson found that by this instruction "the risk of infecting the jury's determination is magnified. An instruction that death is presumed to be the appropriate sentence tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state." 837 F.2d at 1474.

The Idaho death penalty statute, like the jury instruction in Jackson v. Dugger and the Arizona statute, creates a presumption of death by placing the burden of proof of mitigating factors on

the defendant. The language of Idaho Code § 19-2515(c) unambiguously instructs the trial court that upon finding any aggravating circumstances, death is the appropriate penalty, "unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust." This vitiates the requirement of individualized sentencing and is unconstitutional under the Eighth and Fourteenth Amendments.

"Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect." Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979); Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1955, 85 L.Ed. 2d 344 (1985). When such a presumption is employed in a capital sentencing, the risk of infecting the ultimate determination is increased. Jackson v. Dugger, 837 F.2d at 1474. The Eighth and Fourteenth Amendments should not permit "the risk that death penalty will be imposed in spite of factors which may call for a less severe penalty". Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion).

"[T]he presumption in favor of death that arises from requiring that the defendant prove that mitigating circumstances outweigh aggravating circumstances, offends federal due process by effectively mandating death." Adamson v. Ricketts, 865 F.2d at 1043. The Idaho Supreme Court has specifically rejected this holding of the Ninth Circuit in Adamson. State v. Charboneau, No.16339 and 16741, at 43 (April 4, 1989). Certiorari should issue to resolve the clear conflict between the Ninth and Eleventh Circuits and the Idaho Supreme Court.

CONCLUSION

The writ of certiorari should issue and the judgment of the Idaho Supreme Court should be reversed.

Respectfully submitted,

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May 18, 1989.

APPENDIX A

15. Criminal Law ⇐1206.1(2)

Statutory capital punishment procedure was not unconstitutional for failure to limit testimony at sentencing hearing to live testimony, notwithstanding defendant's claims that it was essential to allow cross-examination and rebuttal of adverse sentencing evidence because of possibility that trial court was prejudiced and that statute allowed rampant use of hearsay and other inadmissible information.

16. Homicide ⇐354

Record indicated that trial court described mitigating factors that it considered in imposing death sentence for first-degree murder, including the factual evidence presented in mitigation by defendant and arguments made in connection therewith, and court thereby complied with statutory requirement of analysis of all relevant factors, contrary to defendant's claim that court failed to consider in writing two mitigating factors produced at sentencing hearing. I.C. § 19-2515.

17. Criminal Law ⇐1144.10

A claim of ineffective assistance of counsel cannot be presumed by an appellate court. U.S.C.A. Const.Amend. 6.

18. Criminal Law ⇐641.13(2)

Defendant's claim that he was deprived of constitutional right to effective assistance of counsel in prosecution for first-degree murder was predicated on trial counsel's strategic and tactical choices to defend on theory that defendant was merely an "accessory after the fact" and defendant failed to demonstrate that he was denied reasonably competent assistance or that conduct of trial counsel contributed to conviction. U.S.C.A. Const.Amend. 6.

19. Judges ⇐49(1)

A judge cannot be disqualified for actual prejudice unless it is shown that the prejudice is directed against the litigant and is of such a nature and character that it would make it impossible for the litigant who presided both at t al of first-degree murder prosecution and defendant's motion for postconviction relief, of such a nature and character as would make it impossible for defendant to get a fair postconviction hearing, and defendant was not entitled to disqualify judge, where claimed grounds of bias were merely allegations that because judge had made prior rulings adverse to defendant, he was biased. Criminal Rules 25, 25(a, b); Rules Civ.Proc., Rule 40(d)(3).

21. Judges ⇐51(1)

Defendant failed to show that judge who presided in murder prosecution had become de facto material witness as to conduct of trial by defense counsel, and was therefore barred from presiding at hearing of postconviction motions, since judge was not subpoenaed as a witness and did not testify in postconviction proceedings and stipulation of facts which parties believed that judge might testify to if he had been called as a witness was insufficient to establish that he was in fact a material witness.

22. Criminal Law ⇐998(6)

Trial court did not abuse its discretion in denying defendant's motion for postconviction relief subsequent to murder prosecution, seeking to have court order psychological and physical examinations of defendant, where trial counsel made decision not to move for psychological and physical evaluation based on theory of defense that defendant was only an "accessory after the fact" and such tactical decision was properly not reviewed in hindsight on motion for postconviction relief.

23. Criminal Law ⇐998(1)

Trial court did not abuse its discretion in denying defendant's postconviction motion to compel alcohol evaluation of his trial counsel, absent any factual basis in record for court to order requested evaluation.

24. Homicide ⇐354

Sentence of death for two counts of

arbitrary imposition of death penalty, where evidence at trial supported jury's finding of guilt and court considered numerous statutory aggravating circumstances as well as mitigating circumstances, setting forth extensive rationale for why death penalty was imposed. I.C. §§ 19-2515, 19-2515(g).

25. Homicide ⇐354

Evidence was sufficient to support trial court's finding of statutory aggravating circumstances, for purposes of imposition of death penalty for first-degree murder. I.C. §§ 19-2515, 19-2515(g).

26. Homicide ⇐354

Sentence of death imposed on defendant following his conviction for two counts of first-degree murder was not excessive or disproportionate to penalty imposed in similar cases, considering both crime and defendant, where defendant not only participated in murders but did nothing to prevent codefendant from bludgeoning second victim after witnessing attack on first victim and where character and nature of defendant led to conclusion that he was an extremely dangerous person. I.C. § 19-2827.

Fitzgerald, Sims & Fisher, Lewiston, for appellant. Joan M. Fisher (argued).

Jim Jones, Atty. Gen., Boise, for respondent. Solicitor Gen. Lynn E. Thomas (argued).

BAKES, Justice.

Bryan Lankford was convicted by a jury of two counts of first degree murder for the killings of Robert and Cheryl Bravence. Following the trial, the district court held a sentencing hearing and sentenced the defendant to death. Lankford appeals this conviction and sentence and the district court's denial of his petition for post conviction relief before the same court, which was denied after a hearing. The appeals have been consolidated pursuant to I.C.

Evidence at trial disclosed that in June, 1983, Lankford was living in Texas on probation for a robbery conviction. Lankford was arrested for a DUI violation. Fearing that this violation of his probation would lead to his imprisonment, he fled the state with his older brother, Mark Lankford, in the latter's car. The pair eventually made their way to Idaho County, where they camped in the forest near Grangeville. They concluded that, because the monthly payments on Mark Lankford's car were delinquent, the police would be searching for it and that they needed to abandon the car to avoid capture. They left the car in the woods covered with brush and set off to steal another car.

The brothers came upon the Bravences' campsite and decided to take the Bravences' van. Bryan Lankford walked into the camp armed with a shotgun and engaged the Bravences in conversation. Subsequently, Mrs. Bravence left the group and went to a nearby creek. At this point, Mark Lankford ran into the campsite and ordered Robert Bravence to kneel down on the ground. While kneeling, Mark then hit Robert Bravence over the head with a nightstick. Cheryl Bravence then came up from the creek, and Mark told her to kneel down on the ground and then hit her over the head with the same nightstick. The Bravences were beaten with such force that their skulls had to be reconstructed by an anthropologist before the cause of death could be scientifically determined.

The brothers loaded the bodies into the van and headed back into the forest. The bodies were removed from the van and concealed under branches and other debris a short distance from where the Lankfords had abandoned their car. Lankford and his brother then took the van and traveled through Oregon and California before abandoning it in Los Angeles. During their flight from the murder scene they purchased accommodations and food with

747 P.2d 710

STATE of Idaho, Plaintiff-respondent,

v.

Bryan Stuart LANKFORD, Defendant-appellant.

Bryan Stuart LANKFORD, Petitioner-appellant,

v.

STATE of Idaho, Respondent.

Nos. 15760, 16170.

Supreme Court of Idaho.

July 29, 1987.

Rehearing Denied Oct. 20, 1987.

Defendant was convicted in the District Court, Second Judicial District, Idaho County, George R. Reinhardt, III, J., of two counts of first-degree murder and sentenced to death. His petition for postconviction relief was denied. Defendant appealed. Subsequent to consolidation of appeals, the Supreme Court, Bakes, J., held that: (1) voir dire procedure utilized by trial court did not deny defendant's constitutional right to trial by fair and impartial jury; (2) imposition of death penalty despite fact that prosecutor did not seek such penalty was not an abuse of discretion; and (3) evidence was sufficient to support trial court's finding of statutory aggravating circumstances.

Affirmed.

Huntley, J., concurred and filed opinion.

Bistline, J., concurred only in affirming verdict, dissented and filed opinion.

1. Jury ⇐33(4)

Trial court's voir dire procedure in murder prosecution, stipulated to in advance by prosecution and defense counsel, did not deny defendant's constitutional right to trial by fair and impartial jury on

felt they could not fairly try case and thereafter conducted its own limited examination before permitting counsel to conduct balance of voir dire. U.S.C.A. Const. Amend. 6.

2. Constitutional Law ⇐268(2)
Criminal Law ⇐637

Fact that defendant was guarded while present at his murder trial did not raise question of fundamental constitutional error, and allowing uniformed sheriff's deputies to sit in courtroom with him was not a violation of due process, where defendant appeared in court in three-piece suit rather than in prison garb, with sheriff's officer sitting behind him. U.S.C.A. Const.Amend. 14.

3. Criminal Law ⇐822(1)

Where jury instructions, taken as a whole, correctly state the law and are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that jury gave due consideration to whole charge and was not misled by any isolated portion thereof.

4. Criminal Law ⇐822(1)

Jury instructions in first-degree murder prosecution, taken as a whole, correctly stated the law and were not inconsistent and were not so misleading and confusing that defendant was denied his right to fair trial. U.S.C.A. Const.Amend. 6.

5. Homicide ⇐311

Defendant in murder prosecution was not entitled to proposed jury instruction asking jury to render special verdict on intent, since judge was charged with determination of whether death sentence would be imposed, and hence with sufficiency of finding of intent to kill necessary to support death sentence, and proposed jury instruction therefore was an attempt to impermissibly shift trial court's duty to jury.

6. Homicide ⇐286(2)

Jury instruction in first-degree murder prosecution that "malice is implied when

and did not improperly relieve State of its obligation to prove intent as an essential element of murder, since murder committed during a robbery was by definition murder in the first degree and proof that murder occurred during commission of robbery merely was a substitute for specific proof of premeditation. I.C. § 18-4003.

7. Constitutional Law ⇐270(1)
Criminal Law ⇐1213.2(1)

Felony-murder statute did not violate prohibition against cruel and unusual punishment or due process by punishing conduct without requiring proof of mental state. U.S.C.A. Const.Amends. 8, 14; I.C. §§ 18-4003, 18-4003(d).

8. Criminal Law ⇐1147, 1208.2

Imposition of a sentence is within the sound discretion of the trial court and will not be disturbed by a reviewing court in the absence of an abuse of that discretion, and a sentence that is within prescribed limits of the sentencing statute will not ordinarily be considered an abuse of discretion.

9. Criminal Law ⇐42

Grant of immunity to defendant following his conviction of felony-murder but prior to sentencing, procured by State in order to obtain defendant's testimony against codefendant, his brother, did not deprive trial court of authority to sentence defendant, since none of the testimony given pursuant to immunity agreement was used to prosecute or punish defendant and agreement was only prospective in effect, protecting defendant from any other charges that might have been brought based on his use of murder victims' property. I.C. § 19-1114.

10. Criminal Law ⇐986.1

Trial court's denial of defendant's motion for continuance of sentencing hearing subsequent to conviction for first-degree murder, based on appointment of cocounsel and discharge of trial counsel, was not an abuse of discretion, where court made ex-

nesses at sentencing hearing and there was no showing that important witnesses were unavailable due to denial of motion.

11. Criminal Law ⇐986.2(1)

Pursuant to express provision of statute, evidence produced at defendant's murder trial was available for trial court's consideration at sentencing without necessity of its repetition, with regard to consideration of statutory aggravating circumstances. IC §§ 19-2515, 19-2515(c).

12. Criminal Law ⇐986.2(2)
Homicide ⇐354

Trial court did not abuse its discretion in imposing sentence different from that recommended by prosecuting attorney and imposing death penalty subsequent to murder conviction, notwithstanding failure of prosecutor to offer any additional evidence at sentencing hearing based on fact that he was not seeking death penalty, since trial court had responsibility for sentencing, evidence adduced at trial was available for court's consideration and evidence so used amply supported trial court's imposition of death penalty. I.C. §§ 19-2515, 19-2515 (c-e).

13. Homicide ⇐354

Prosecution's written notice that it would not seek death penalty subsequent to defendant's conviction of first-degree murder did not negate previously administered statutory notice that defendant might be sentenced to death, and court's express advice to defendant at arraignment that death penalty was possible sentence for crimes with which he was charged, as well as existence of death penalty statute in statute books, constituted sufficient notice of possible imposition of death penalty.

14. Criminal Law ⇐1213.7
Jury ⇐24

Capital punishment procedure did not violate prohibition on

Lankford's. Fearing that the authorities were closing in on them, they fled into a remote and inaccessible area of the state where they were ultimately discovered and captured. Among the items found with the Lankfords was a knife which had belonged to Mr. Bravence.

Although the Bravences' bodies were not found until late September, they had been reported missing and, upon discovering the van, the Los Angeles Police Department conducted a forensic examination of the vehicle. The examination turned up numerous incriminating items, including the Lankfords' fingerprints. The Los Angeles police then turned the investigation over to the Federal Bureau of Investigation.

After his arrest Lankford made numerous confessions regarding the killings, none of which were challenged on direct appeal.[1] These statements included two statements made to Texas law enforcement officers, several statements and a written confession to an FBI agent and, after an aborted suicide attempt, Lankford made another statement to an Idaho County deputy sheriff. After Lankford was extradited to Idaho, he was charged with two counts of first degree murder. An attorney was *appointed* to represent Lankford.

The trial was held in March, 1984. In the process of jury selection, in accord with a stipulation by the parties, the trial court separated from the venire all persons who had heard a significant amount of information about the case in order that the jury could be selected from people who had heard little of the case. Voir dire then took place as to the remaining jurors. No significant difficulty was experienced in selecting the jury.

Lankford's defense theory was that he was only an accessory after the fact. Lankford testified in his own behalf and stated that he was dominated by his older brother who was a violent and dangerous person. He testified that he thought his

testified that after the murders he was hysterical and remained in the van while his brother hid the bodies in the woods. The jury nevertheless found Lankford guilty of two counts of first degree murder.

Subsequent to conviction and sentencing, Lankford filed a petition seeking post conviction relief and moved to disqualify the district judge from presiding at the post conviction relief hearing on the basis of prejudice. The motion was denied. At the post conviction hearing, Lankford argued that his trial counsel had been ineffective for a number of reasons, including his failure to demand that Lankford be subject to a psychological and physical evaluation. The defendant further argued that the trial court had erred in failing to require trial counsel to be forced to submit to an alcohol evaluation. After a hearing, the court denied post conviction relief.

On appeal to this Court, Lankford raises twenty-two issues. Eight of these issues arose from the trial proceedings; nine of the issues questioned the sentencing procedure; two issues dealt with the post conviction relief proceeding; and three issues relate to this Court's statutorily required automatic review of a death sentence. While this Court has reviewed all twenty-two issues, we have found that some were not raised below and thus were not preserved for appeal. Several issues are closely related, and we have consolidated them. For the reasons set out below, we affirm the judgments and sentences.

I

Direct Appeal Issues

At the outset we note that the defendant appealing from a criminal conviction bears the burden of demonstrating error in the lower court. *State v. Wallace*, 98 Idaho 318, 563 P.2d 42 (1977). Furthermore, error will not be presumed on appeal but must be affirmatively shown by the appel-

served to merit review. *State v. Thomas*, 94 Idaho 430, 489 P.2d 1310 (1971).[2] Keeping in mind the standards of review set by our prior case law, we now turn to the issues.

A.

Lankford argues that the trial court failed to question jurors regarding the adverse effect of pretrial publicity, and therefore he was denied his constitutional right to a trial by a fair and impartial jury. Lankford acknowledges that no objection was raised below as to the *voir dire* process, and therefore the issue is not properly preserved for appeal, absent fundamental error. *State v. White, supra*. However, Lankford argues nevertheless that the failure to question jurors regarding pretrial publicity amounted to fundamental error.

[1] The trial court initially questioned jurors regarding pretrial publicity and, based upon a procedure agreed on in advance by counsel, then eliminated all those who felt that they could not fairly try the case.[3] Thereafter, the trial court conducted a limited *voir dire* examination and the balance of the *voir dire* process was conducted by counsel. Lankford has not established any error, much less fundamental error, in the jury selection process. This Court has ruled that great latitude is to be allowed in examination of veniremen upon *voir dire*. *See State v. Pontier*, 95 Idaho 707, 518 P.2d 969 (1974); *State v. Bitz*, 93 Idaho 239, 460 P.2d 374 (1969). The *voir dire* procedure was established by stipulation of counsel, and there is no indication of any abuse of discretion by the trial court in the manner in which he exercised the *voir dire* examination. Accordingly, the claimed error is without merit.

B.

[2] Next, Lankford asserts that it was a "fundamental error" and a violation of due process for the trial court to allow uniformed sheriff's deputies to sit in the courtroom with him. We disagree. The fact that Lankford was guarded while present at the trial fails to raise the question of fundamental constitutional error. The record demonstrates that Lankford did not appear in prison garb, *State v. Crawford*, 99 Idaho 87, 577 P.2d 1135 (1978); rather, at trial he appeared in a three-piece suit. A sheriff's officer sat behind him. In *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), the United States Supreme Court addressed the issue of whether the presence of four uniformed and armed officers was so inherently prejudicial that the defendant was denied his constitutional right to a fair trial. Writing for the majority, Justice Marshall found that unlike cases which involved a criminal defendant being brought to trial in prison garb the presence of the uniformed troop-

2. The exception to the general rule is that this Court will review "fundamental error" on appeal even when no adequate objection has been interposed at trial. *State v. White*, 97 Idaho 708, 551 P.2d 1344 (1976), *cert. den.* 429 U.S. 842, 97 S.Ct. 118, 50 L.Ed.2d 111 (1976).

"'Error that is fundamental must be such error as goes to the foundation or basis of the defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to prevent him to waive. Each case will of necessity, under such a rule, stand on its own merits. Out of facts in each case will arise the law.' *See also*

attorneys, the district court judge requested all prospective jurors who "will not be in a position to serve as a result of bias, prejudice or undue influence or any other reason that they may be aware of" to raise their hands. Those veniremen who raised their hands were then sent to the back of the room, and the *voir dire* examination continued without calling those persons.

Although the procedures used by the district judge may not have been common practice, both counsel agreed in advance that the procedure was designed and reasonably calculated to assure a selection of an unbiased jury. Lankford's attorney, the prosecutor and the district court judge were all residents of Idaho County

ers did not prejudice the defendant. Justice Marshall stated:

"We do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial. (Citations omitted.) But we simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of the courtroom's spectator section. (Footnote omitted.) Even had the jurors been aware that the deployment of the troopers was not common practice in Rhode Island, we cannot believe that the use of the four troopers tended to brand the respondent in their eyes 'with an unmistakable mark of guilt.'" *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 1347, 89 L.Ed.2d 525 (1986) (citations omitted).

No error resulted from the fact that Lankford was guarded by law enforcement officers during his trial.

C.

Lankford next makes a broad based and comprehensive attack on the instructions which were presented to the jury. Lankford claims that the jury instructions as a whole misstated the law and were so misleading and confusing that the defendant was denied his right to a fair trial. In addition to claiming the instructions as a whole are erroneous, Lankford also attacks numerous individual instructions. Many of the errors claimed in the instructions were not addressed by objections during the trial and have not been properly preserved for this appeal. Absent a timely objection to the jury instructions, Lankford's assignments of error with respect thereto are not entitled to consideration on appeal. *State v. Watson*, 99 Idaho 694, 587 P.2d 835 (1978).

[3, 4] Where the jury instructions, taken as a whole, correctly state the law and are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole charge and was not misled by any isolated portion thereof. *State v. Tope*, 86 Idaho 462, 387 P.2d 888 (1963). After reviewing the record we find that the instructions, either individually or as a whole, were not in error. We will deal specifically with two of Lankford's claims of error.

[5] First, Lankford argues that the district court erred when it refused defendant's Proposed Jury Instruction Number 4[4] that asked the jury to render a special verdict on the defendant's intent. The crux of Lankford's claim is that under the United States Constitution a defendant cannot be sentenced to death for felony murder without a finding of an *intent* to kill. However, in Idaho it is the judge and not the jury who makes the determination of whether the death sentence will be imposed. Accordingly, the district court did not err when it refused Lankford's Proposed Instruction No. 4 which attempted to impermissibly shift the trial court's duty to find an intent to kill to the jury.

[6] Lankford also argues that Instruction No. 17[5] was improper because it in-

4. "DEFENDANT'S REQUESTED INSTRUCTION NO. 4

.....

"Answer this question only if you find the defendant, Bryan Lankford, guilty of Murder in the first degree.

Do you find, beyond a reasonable doubt that Bryan Lankford himself killed, attempted to kill, or had any intent to kill either of the victims in this case?"

5. "INSTRUCTION NO. 17

is done for a base, antisocial purpose, and with a wanton disregard for human life by which is meant, an awareness of a duty imposed by law not to commit such acts followed by the commission of the forbidden act despite that awareness, or when the killing is a direct and casual result of the perpetration or attempt to perpetrate a felony inherently dangerous to human life, specifically in this case robbery.

"The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

structed the jury that "malice is implied when the killing results from an act involving a high degree of probability that it will result in death...." Lankford argues that the instruction relieved the state of proving intent and since the state must prove each essential element of a crime beyond a reasonable doubt the jury instruction was erroneous and in effect diminished the state's burden of proof. We disagree. Contrary to Lankford's assertion, the instruction does not state that killing in perpetration of a robbery is malice *per se*. The instruction *does* advise the jury that malice can be implied in some situations. The United States Supreme Court has stated that:

"In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury. [Citation omitted.] ....

"No one doubts that the trial court could properly have instructed the jury that it could *infer* malice from respondent's conduct. [Citation omitted.] Indeed, in the many cases where there is no direct evidence of intent, that is exactly how intent is established. For purposes of deciding this case, it is enough to recognize that in some cases that inference is overpowering. [Citation omitted.]" *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). (Emphasis in original.)

Murder committed during the course of a robbery is, by definition, murder in the first degree. I.C. § 18-4003. Proof that the murder occurred during the commission of a robbery merely is a substitute for specific proof of premeditation on the theory that one who prepares for a robbery by making arrangements to use deadly force is guilty of acts as culpable as, and probably comprising, premeditation. *See* 40 Am. Jur.2d § 72, Felony-murder Generally.

D.

[7] Next, Lankford attacks the constitutionality of I.C. § 18-4003(d)—felony mur-der,[6] arguing that under *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and its progeny the statute violates the 8th amendment prohibition against cruel and unusual punishment and the 14th amendment guarantee of due process by punishing conduct without requiring proof of a mental state. Lankford's argument has been considered by this Court at length in *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), and *State v. Paradis*, 106 Idaho 117, 676 P.2d 31 (1984), and we have found the statute to be constitutional and in compliance with *Enmund*.

II

Sentencing Issues

[8] Imposition of a sentence is within the sound discretion of the trial court and will not be disturbed by a reviewing court in the absence of an abuse of that discretion, and a sentence that is within prescribed limits of the sentencing statute will not ordinarily be considered an abuse of discretion. *State v. Butler*, 95 Idaho 899, 523 P.2d 31 (1974). After reviewing the record, we find that the district court did not abuse its discretion in sentencing Lankford and that there were no significant errors in the sentencing procedure.

A.

[9] After Lankford was convicted of two counts of felony murder, but before sentencing, the state entered into an immunity agreement with him under I.C. § 19-1114 in order to obtain his testimony against his brother. Lankford contends that this grant of immunity (which was after the verdict but prior to his sentencing) deprived the district court of the authority to sentence the defendant. We conclude that the district court did not err when it found that the immunity agreement (Defendant's Exhibit #1) between

the state and Lankford did not immunize Lankford from sentencing for the crimes for which he had already been convicted when the agreement was entered into.

I.C. § 19–1114 states in part that, "If ... the person would have been privileged to withhold the answer given ... that person shall not be prosecuted or subject to penalty ... *on account of any fact or act concerning which ... he answered.*" (Emphasis added.) By its clear wording, the statute does not apply in this case. None of the testimony given by Lankford pursuant to the immunity agreement was used to prosecute or to punish Lankford.[7] Instead of providing retroactive protection, the immunity agreement was prospective in effect and protected Lankford from any other charges that might have been brought pursuant to his use of the Bravences' property.

B.

[10] Next Lankford argues that the district court erred when it denied his motion for a continuance of the sentencing hearing. The relevant facts show that Lankford made a motion to have co-counsel appointed. The motion was granted and additional counsel was appointed; however, the district court warned Lankford and the newly appointed counsel that granting the motion would not automatically lead the court to grant a motion for continuance. On October 10, 1984, the new co-counsel moved to discharge the trial counsel; this motion was also granted and the district court once again warned Lankford that granting the motion would not automatically lead to a continuance.

"A decision to grant or deny a motion for continuance is vested in the sound discretion of the trial court." *State v. Ward,* 98 Idaho 571, 574, 569 P.2d 916, 919 (1977). Absent a showing that the appellant has shown that his substantial rights have been prejudiced, or that the district court abused its discretion, we will not reverse a denial of a motion for continuance. *See State v. Laws,* 94 Idaho 200, 485 P.2d 144 (1971).

The motion for a continuance was not arbitrarily denied. The record demonstrates that the district court made extensive findings into the information available to Lankford's attorney for sentencing purposes. Lankford's new attorney had adequate information and called numerous witnesses at the sentencing hearing. There was no showing that important witnesses were unavailable due to the denial of the motion. The state was prepared for the scheduled hearing, brought in witnesses, and incurred significant expenses, while no prejudice to Lankford was shown. In *State v. Brown,* 98 Idaho 209, 212, 560 P.2d 880, 883 (1977), we stated that "a defendant may not indefinitely postpone trial or sentencing by continually changing counsel...."

C.

[11, 12] Lankford contends that the district court erred in imposing the death penalty where the prosecution offered no evidence in support of the statutory aggravating circumstances set forth in I.C. § 19–2515. At sentencing, the prosecutor did not seek the death penalty, and therefore he did not offer any additional evidence at the sentencing hearing. It is Lankford's contention that the evidence produced at trial was not available to the judge for purpose of sentencing, and therefore the district court had no evidence with which to find the statutorily required aggravating circumstances. However, I.C. § 19–2515(c) expressly provides, "Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing." The evidence that was used at the sentencing hearing by the trial court judge amply supported the trial court's conclusion. The trial court is entrusted with the responsibility for sentencing in Idaho, I.C. § 19–2515(c), (d), (e); *State v. Creech,* 105 Idaho 362, 670 P.2d 463 (1983), *cert. den.,* 465 U.S. 1051, 104 S.Ct. 1327, 79 L.Ed.2d 722 (1984), and therefore the district court was not bound by the recommendations of the prosecuting attorney. In *State v. Kohoutek,* 101 Idaho 698, 619 P.2d 1151 (1980), we held that there was no abuse of a district court's discretion when it proposed a sentence different from that recommended by the prosecuting attorney. The district court had sufficient evidence before it and did not abuse its discretionary authority to sentence the defendant.

D.

[13] Next, Lankford contends that the district court erred when it failed to notify the defendant of the possibility of the imposition of the death penalty. After the verdict was rendered, and in preparation for sentencing, the district court ordered the prosecution to give written notice on whether it would seek the death penalty. The prosecution responded that it would not. Lankford argues that the prosecution's written notice negated the statutory notice that he might be sentenced to death. We disagree.

7. Lankford asserts that the district court judge used the immunized testimony in its findings of fact to support the imposition of the death penalty. However, the record does not support that assertion. While the district court described Lankford's testimony at his brother's motion for new trial in its sentencing memorandum, it was not considered as an aspect of any of the statutory aggravating circumstances found by the court. During the district court's oral discussion of the sentence, the judge stated:

"The defendant has shown no remorse for his

October 10, 1984 in the companion case, *State v. Mark Lankford,* Idaho County Case No. 20158, that he called the *Lewiston Tribune* and claimed that it was he alone who murdered the Bravences. This he later denied and offered the explanation which is set forth in the addendum to the presentence investigation report under date of October 3, 1984, to the effect that it was simply part of a plan that would secure freedom for his brother, who could in turn free him."

Although it is true that the district court judge

charged with. Additionally, the United States Supreme Court has pointed out that the "existence [of a death penalty statute] on the statute books provides fair warning as to the degree of culpability which the state ascribed to the act of murder." *Dobbert v. Florida,* 432 U.S. 282, 298, 97 S.Ct. 2290, 2300, 53 L.Ed.2d 344 (1977). Lankford has not cited us to any authority which supports his position that he was entitled to greater notice than that given by the statutes and by the district court.

E.

Next, Lankford attacks the constitutionality of Idaho's capital punishment procedure, arguing generally that I.C. § 19–2515 violates the eighth amendment's prohibition on cruel and unusual punishment and the sixth amendment's right to a trial by jury because the statute does not require jury participation in the sentencing procedure. Furthermore, Lankford contends that I.C. § 19–2515(d) is specifically unconstitutional under both Idaho and United States Constitutions because it does not require the district court to limit the testimony at the sentencing hearing to live testimony. Lankford argues that it is essential that a defendant be allowed to cross examine and rebut adverse sentencing evidence because of the possibility that the trial court is prejudiced and that the Idaho statute allows rampant use of hearsay and other inadmissible information.

[14, 15] The issue of jury participation has been resolved in Idaho in *State v. Creech,* 105 Idaho 362, 670 P.2d 463 (1983), and *State v. Osborn,* 102 Idaho 405, 631 P.2d 187 (1981), and approved under the United States Constitution in *McMillan et al. v. Pennsylvania,* 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). The issues of hearsay testimony and defendant's right to cross examine or confront adverse testimony has likewise been resolved against appellant's position. *See State v. Osborn, supra.*

ing two mitigating factors which were produced at the sentencing hearing was error that requires remanding for sentencing. The two mitigating factors which Lankford complains were not considered in writing by the district court are (1) that the prosecution recommended a sentence less than the death penalty, and (2) that the defendant had taken and substantially passed two polygraph tests that had been requested by the state. Lankford asserts that the sentencing statute, I.C. § 19–2515, has been given a broad interpretation by the courts with the intent of ensuring that a thorough and reasoned analysis of all relevant factors take place.

The record demonstrates that the district court described the mitigating factors that it considered in sentencing Lankford. Those mitigating factors included all of the factual evidence presented in mitigation by the defendant and the arguments made in connection with them. It is clear from the record that the district court judge complied with the requirements of I.C. § 19–2515.

III

Post Conviction Relief Issues

After sentencing and conviction, Lankford brought an action for post conviction relief in the district court. After an extended hearing, the district court made findings denying this petition. A denial of post conviction relief will not be disturbed on appeal where there is substantial competent evidence supporting the denial. *State v. Hinkley,* 93 Idaho 872, 477 P.2d 495 (1970). After reviewing the record of the post conviction relief proceeding we find that there was substantial and competent evidence to support the district court's findings.

A.

Lankford first argues that he was deprived of his constitutional right to effective assistance of counsel. He contends that his trial counsel failed to: (1) move for a change of venue; (2) adequately prepare for and conduct the *voir dire* which would allow the selection of a fair and impartial jury; (3) fully investigate and prepare the factual and legal basis for the defendant's case; (4) file motions to suppress constitutionally infirm statements taken of the defendant; (5) file a motion for psychiatric or psychological evaluation; (6) file a request for discovery; (7) research and raise viable defenses; (8) object to the defendant being compelled to go to trial under heavy guard; (9) request a limiting instruction on the use of prior inconsistent statements; (10) object to irrelevant, immaterial and prejudicial evidence; (11) request a limiting instruction on impeachment by prior felony conviction; (12) object to erroneous instructions. Lankford concludes that these errors and omissions of the trial counsel require a reversal of the defendant's convictions. However, we conclude that the record does not support the allegations.

[17] A claim of ineffective assistance of counsel cannot be presumed by an appellate court. *State v. Elisondo,* 97 Idaho 425, 546 P.2d 380 (1976). We have examined an extensive record in which the parties explored in detail the basis for Lankford's allegations through witnesses and affidavits and through direct and cross examination. A review of this record clearly establishes that Lankford was not deprived of the right to effective assistance of counsel. The United States Supreme Court has stated that the test to be applied to a claim of ineffective assistance of counsel is whether counsel's conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Also see Burger v. Kemp,* — U.S. —, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987). This issue has been extensively litigated in Idaho. In *Estes v. State,* 111 Idaho 430, 725 P.2d 135

8. The record demonstrates that Lankford's counsel made it clear that the motion to disqualify was *for cause* and was not brought under I.C.R. 25(a) permitting peremptory disqualification. (Tr., post conviction relief proceedings, p. 20.) We note that I.C.R. 25(a) is not available to

entitled to the reasonably competent assistance of an attorney. *State v. Tucker,* 97 Idaho 4, 8, 539 P.2d 556, 560 (1975). *Accord Strickland v. Washington,* 466 U.S. at 686, 104 S.Ct. at 2064. 'A showing that defendant was denied the reasonably competent assistance of counsel is not sufficient by itself to sustain a reversal of the conviction. The defendant, in most cases, must make a showing that the conduct of counsel contributed to the conviction or the sentence imposed.' *State v. Tucker,* 97 Idaho at 4, 539 P.2d at 564 (1975); *see also State v. Tisdel,* 101 Idaho 52, 54, 607 P.2d 1326, 1328 (1980). We have also repeatedly stated that we will not attempt to second-guess strategic and tactical choices made by trial counsel. *State v. Larkin,* 102 Idaho 231, 233, 628 P.2d 1065, 1067–68 (1981); *State v. Tucker,* 97 Idaho at 10, 539 P.2d at 562.

"These standards, articulated by both the United States Supreme Court and this Court, must be used to determine whether Estes received effective assistance of counsel. As the Supreme Court has stated, 'A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time.' *Strickland v. Washington,* 466 U.S. at 689, 104 S.Ct. at 2065. The presumption in evaluating attorney effectiveness is that the attorney is competent and that his actions represent sound trial strategy. A defendant shoulders a difficult burden when he seeks to assert ineffective assistance of counsel." *Estes v. State,* 111 Idaho at 434, 725 P.2d at 139 (footnote omitted).

[18] At the post conviction relief hearing, Lankford's trial counsel testified that the extensive physical evidence, Lankford's numerous admissible confessions, and the verbal testimony which would be produced by the prosecution at trial was sufficient to convict Bryan Lankford of first degree murder. He stated that after evaluating this evidence he determined that Lankford's best opportunity to avoid a first degree murder conviction was to defend on the theory that Lankford was an "accessory after the fact." All of the charges against Lankford's counsel are a direct result of the trial counsel's strategic and tactical choices to defend Lankford on the "accessory after the fact" defense. Because it is not the function of a reviewing court to substitute its judgment or that of a substitute counsel for the strategic and tactical choices of the trial counsel, *State v. Larkin,* 102 Idaho 231, 233, 628 P.2d 1065, 1067–68, Lankford's new counsel must do more than demonstrate that alternative strategies were available which might have been better. In sum, none of the numerous charges made by the defendant against his trial counsel demonstrate that (1) Lankford was denied the reasonably competent assistance of counsel, and (2) that the conduct of his trial counsel contributed to his conviction.

B.

[19] Next, Lankford claims that the district court erred in denying defendant's motion to disqualify the court for prejudice.[8] Following conviction and sentencing, the defendant moved to disqualify for cause the trial judge from the post conviction relief proceeding pursuant to I.R.C.P. 40(d)(3)[9] and I.C.R. 25(b).[10] Lankford's at-

an affidavit of the party or his attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause must be made not later than 5 days after service of a notice setting the action

IV

Automatic Review

Pursuant to I.C. § 19–2827, all death sentences come to this Court on automatic review. The automatic review statute requires the Supreme Court to "consider the punishment as well as any errors enumerated by way of appeal." The statute requires this Court to undertake a three-part analysis to determine:

"(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

"(2) Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in section 19-2515, Idaho Code, and

"(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." I.C. § 19–2827.

(1) ***Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.***

[24] Lankford argues that the death penalty was imposed under the influence of passion, prejudice and other arbitrary factors. The basis for Lankford's claim is his assertion that the community where the defendant was tried was outraged by the crime and that it is reasonable to believe that the district court was affected by the community's mood and that this environment led to the arbitrary imposition of the death penalty.

Contrary to Lankford's assertions, there is nothing in the record that indicates that the sentence of death was due to the influence of passion, prejudice or any other arbitrary factors. To the contrary, we find the trial was conducted in an error-free manner by a district court judge who sought every opportunity to provide Lankford with a fair trial. The jury instructions clearly informed the jury of the applicable law and the evidence presented at trial supports the jury's finding of two counts of first degree murder. The district court, after studying the presentence report and conducting an involved sentencing hearing in which the defendant produced witnesses and information favorable to his cause, made findings both in mitigation and in aggravation. In addition, the Court found numerous statutory aggravating circumstances as delineated under I.C. § 19–2515(g).[13] After laying the findings in mitigation and aggravation, the district court set forth extensive rationale for why the death penalty was imposed. This Court can find no error in the procedure followed by the district court in making its findings.

(2) ***Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in Section 19-2515, Idaho Code.***

[25] Lankford argues that the evidence was insufficient to support the district court's finding of the statutory aggravating factors. Lankford claims that the evidence also failed to show (1) that the murder and the circumstances surrounding its commission demonstrated an utter disregard for human life; (2) that the defendant acted calmly or in a calculated manner; (3) that the defendant has a propensity to commit murder which will probably constitute a continuing threat to society; (4) that the defendant's acts were accompanied by a specific intent to kill.

After reviewing the complete record in this case, it is evident that the trial court's finding of the aggravating circumstances listed above were clearly supported by the evidence produced. Lankford's testimony clearly supports aggravating circumstances (1), (2) and (4).

(3) ***Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.***

[26] Finally, we have conducted our proportionality review as required by I.C. § 19–2827. To complete this process, we have reviewed the sentence imposed and the sentences imposed in similar cases in an effort to assure that the sentence in this case was not excessively disproportionate.[14] In making such a comparison, we have generally considered (1) the nature of and the motive for the crime committed; (2) the heinous nature of the crime; and (3) the nature and character of the defendant to determine whether the sentence was proportionate and just. After thoroughly examining the record and evaluating these factors, we find nothing that would indicate that the sentence of death imposed against Lankford was disproportionate or unjust.

13. "**19–2515. Inquiry into mitigating or aggravating circumstances—Sentence in capital cases—Statutory aggravating circumstances—Judicial findings.—** . . .

. . . .

"(g) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:

(1) The defendant was previously convicted of another murder.

(2) At the time the murder was committed the defendant also committed another murder.

(3) The defendant knowingly created a great risk of death to many persons.

(4) The murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the

(6) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

(7) The murder was one defined as murder of the first degree by section 18–4003, Idaho Code, subsections (b), (c), (d), (e) or (f), and it was accompanied with the specific intent to cause the death of a human being.

(8) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

(9) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise

14. Those cases we have considered include: *State v. Johns,* 112 Idaho 873, 736 P.2d 1327 (1987); *State v. Stuart,* 110 Idaho 163, 715 P.2d 833 (1985); *State v. Windsor,* 110 Idaho 410, 716 P.2d 1182 (1985); *State v. Scroggins,* 110 Idaho 380, 716 P.2d 1152 (1985); *State v. Fetterly,* 109 Idaho 766, 710 P.2d 1202 (1985); *State v. Bean,* 109 Idaho 616, 710 P.2d 526 (1985); *State v. Aragon,* 107 Idaho 358, 690 P.2d 293 (1984); *State v. Bainbridge,* 108 Idaho 273, 698 P.2d 335 (1985); *State v. Paradis,* 106 Idaho 117, 676 P.2d 31 (1983); *State v. Gibson,* 106 Idaho 54, 675 P.2d 33 (1983); *State v. Sivak,* 105 Idaho 900, 674 P.2d 396 (1983); *State v. Creech,* 105 Idaho 362, 670 P.2d 463 (1983); *State v. Major,* 105 Idaho 4, 665 P.2d 703 (1983); *State v. Mitchell,* 104 Idaho 493, 660 P.2d 1336 (1983), *cert. den.,* 461 U.S. 934, 103 S.Ct. 2101, 77 L.Ed.2d 308 (1983); *State v. Carter,* 103 Idaho 917, 655 P.2d 434 (1982); *State v. Olin,* 103 Idaho 391, 648 P.2d 203 (1982); *State v. Stormoen,* 103 Idaho 83, 645 P.2d 317 (1982); *State v. Osborn,* 102 Idaho 405, 631 P.2d 187 (1981); *State v. Griffiths,* 101 Idaho 163, 610 P.2d 522 (1980); *State v. Padilla,* 101 Idaho 713, 620 P.2d 286 (1980); *State v. Fuchs,* 100 Idaho 341, 597 P.2d 227 (1979); *State v. Needs,* 99 Idaho 883, 591 P.2d 130 (1979); *State v. Lindquist,* 99 Idaho 766, 589 P.2d 101 (1979); *State v. Bradley,* 98 Idaho 918, 575 P.2d 1306 (1978); *State v. Birrueta,* 98 Idaho 631, 570 P.2d 868 (1977); *State v. Allen,* 98 Idaho 782, 572 P.2d 885 (1977); *State v. Wood,* 527 P.2d 487 (1974); *State v. Hatton,* 95 Idaho 856, 522 P.2d 64 (1974); *State v. Standlee,* 96 Idaho 165, 525 P.2d 360 (1974); *State v. Foley,* 95 Idaho 222, 506 P.2d 119 (1973); *State v. Beason,* 95 Idaho 267, 506 P.2d 1340 (1973); *State v. Atwood,* 95 Idaho 124, 504 P.2d 397 (1972); *State v. Sanchez,* 94 Idaho 125, 483 P.2d 173 (1971); *State v. Gomez,* 94 Idaho 323, 487 P.2d 686 (1971); *State v. Dillon,* 93 Idaho 698, 471 P.2d 553 (1970), *cert. den.,* 401 U.S. 942, 91 S.Ct. 947, 28 L.Ed.2d 223 (1971); *State v. Radabaugh,* 93 Idaho 727, 471 P.2d 582 (1970); *State v. Rodriguez,* 93 Idaho 286, 460 P.2d 711 (1969); *State v. Jiminez,* 93 Idaho 140, 456 P.2d 784 (1969); *King v. State,* 93 Idaho 87, 456 P.2d 254 (1969); *State v. Gonzalez,* 92 Idaho 152, 438 P.2d 897 (1968); *State v. Chaffin,* 92 Idaho 629, 448 P.2d 243 (1968); *Carey v. State,* 91 Idaho 706, 429 P.2d 836 (1967); *State v. Koho,* 91 Idaho 450, 423 P.2d 1004 (1967); *State v. Anstine,* 91 Idaho 169, 418 P.2d 210 (1966); *State v. Gish,* 87 Idaho 341, 393 P.2d 342 (1964); *State v. Clokey,* 83 Idaho 322, 364 P.2d 159 (1961); *State v. Burris,* 80 Idaho 395, 331 P.2d 265 (1958); *State v. Snowden,* 79 Idaho 266, 313 P.2d 706 (1957); *State v. Buchanan,* 73 Idaho 365, 252 P.2d 524 (1953); *State v. Owen,* 73 Idaho 394, 253 P.2d 203 (1953) (considered only in terms of crime committed and penalty imposed; overruled on substantive law point in *State v. Shepherd,* 94

torney filed the affidavit of prejudice and no counter affidavit was filed.[11] The motion was denied. The parties later stipulated to facts which they believed the trial judge could testify to if called as a witness.[12] The stipulation (which was not based on actual testimony) stated that the judge had knowledge that Lankford's trial counsel had been arrested for DUI and that the judge had received a letter from the defendant requesting a new counsel based on allegations of alcohol abuse, and this letter led to the appointment of co-counsel. The stipulation was received into evidence and then defense counsel reargued its motion asserting that because of the stipulation the trial judge was now a material witness in the case and must be disqualified. This motion was also denied.

Lankford argues that the affidavit and the stipulation were legally sufficient to show prejudice and that the case should be remanded with directions that the trial judge disqualify himself and the matter reassigned. In Idaho a judge cannot be disqualified for actual prejudice unless it is shown that the prejudice is directed against the litigant and is of such a nature and character that it would make it impossible for the litigant to get a fair trial. *State v. Waterman,* 36 Idaho 259, 210 P. 208 (1922).

[20] Lankford's affidavit claimed bias on the following grounds: (a) that the district court judge presided in the trial that found Lankford guilty of two counts of first degree murder; (b) that the judge had previously ruled on motions for continuance, new trial, alleged ineffective assistance of counsel, and sentencing; (c) that by presiding in the above matters it would be unreasonably difficult for the judge to impartially determine questions of fact raised in the affiant's petition for post conviction relief; (d) that in assessing the death penalty the judge made findings that Lankford is not a credible person; (e) that Lankford is a material witness in the post confiction relief action and because the judge has determined that he is not a credible witness he will not receive an unbiased determination of his credibility; (f) that Lankford had reason to believe that the district court judge may be a material witness to the factual allegations supporting the claim of ineffective assistance of counsel; (g) that at the affiant's sentencing hearing the district court judge elicited testimony to support the court's findings of fact in a leading manner, and thereby showed his bias and prejudice against Lankford; (h) that the district court judge on his own motion caused testimony favorable to the affiant (results of polygraph examination which showed Lankford to be truthful on material facts) to be stricken and removed from the jury's consideration; (i) that there is extreme community hostility and prejudice toward Lankford in Idaho County and that this community feeling makes it unreasonably difficult for the judge, who is a resident of the community and an elected official, to impartially hear the affiant's petition; (j) that because the judge found the offenses of which Lankford was convicted to be heinous, atrocious, and exhibiting an utter disregard for human life he could not now determine the merits of Lankford's petition in a neutral, detached, dispassionate and impartial manner; (k) because the issues raised in the petition for post conviction relief directly affect the judgment of the district court judge, it is impossible for the trial court to be impartial; (*l*) that the district court judge has attached an emotional commitment to the "correctness" of his initial determination and cannot render an impartial determination on the merits of Lankford's position; and (m) that a trial court having presided at the trial and sentencing cannot reasonably be expected to determine matters raised relating to said conviction and sentence in an impartial manner.

Lankford's allegations of bias do not show any actual prejudice on the part of the judge directed toward Lankford of such a nature and character that it would have made it impossible for Lankford to get a fair post conviction hearing. Many of the grounds listed above, stated separately or concurrently, do nothing more than state facts that simply explain the course of events involved in a criminal trial. The remaining grounds are mere allegations that, because the judge had made prior

[21] Finally, Lankford's allegation that the district court judge had become a *de facto* material witness in the case and was therefore barred from participation in the case is without merit. The record demonstrates that the district court judge was not subpoenaed as a witness and did not testify in the proceedings. A criminal defendant cannot turn the district court judge into a material witness by introducing a stipulation of facts which the parties believe that the judge might testify to if he was in fact called as a witness. Thus, we reject Lankford's claim that the district court judge had become a material witness in the post conviction relief proceeding.

C.

[22] Next, Lankford claims that the district court abused its discretion in the post conviction relief proceeding by denying two of Lankford's motions. First, Lankford moved to have the court order complete psychological and physical examinations conducted on himself. The court denied the motion. Then Lankford made a motion to compel an alcohol evaluation of the trial counsel. The court denied this request also. We find that the district court did not abuse its discretion in denying the motions. The testimony clearly indicates that Lankford's trial counsel made the decision not to move for psychological and physical evaluation of the defendant based on the strategy of claiming that Lankford was not involved in the crime but was only an "accessory after the fact." Such a tactical decision should not be reviewed in hindsight during post conviction relief. We find there was no abuse of discretion when the district court denied this motion.

[23] Regarding the motion to compel an alcohol evaluation of Lankford's trial counsel, there is no factual basis in the record for the court to order the alcohol evaluation. Lankford's trial counsel testified that he had not consumed alcohol while working on the case, and nothing in the record

court such motion may be made by a party not later than 5 days after service of the notice setting the action for re-trial. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions."

10. "**Rule 25. Disqualification of judge.—** . . .

"(b) Disqualification for cause. Any party to an action may disqualify a judge or magistrate from presiding in any action upon any of the following grounds:

"(1) That he is a party, or is interested, in the action or proceeding.

"(2) That he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law.

"(3) That he has been attorney or counsel for any party in the action or proceeding.

"(4) That he is biased or prejudiced for or against any party or his case in the action.

12. The stipulation reads: "Comes now, attorney for Petitioner, Joan Fisher and attorney for Respondent, Henry R. Boomer, do hereby stipulate and agree that if the Honorable George R. Reinhardt was to testify in this matter, he would say the following: One, that prior to attorney W.W. Longeteig's appointment as counsel for Bryan Stuart Lankford in Case No. 20157, Judge George R. Reinhardt believed that W.W. Longeteig had either pled guilty, been arrested, or was convicted of driving under the influence of alcohol on more than one occasion, and based upon that, Reinhardt felt that W.W. Longeteig had a problem with alcohol.

"Two, that on July 28, 1984, George Reinhardt received certain correspondence from Bryan Lankford which is attached hereto—which is not, because we were not putting it in writing, but it was a motion that was before the court, which the court ruled upon and appointed co-counsel. And with reference to the allegations concerning alcohol, and based upon paragraph

Lankford, as described by Bryan Lankford. The majority opinion recites that "Lankford testified that he did not intend that the Bravences die," which is correct. He also testified that he did not know in advance what Mark Lankford had in mind, other than the stealing of a vehicle:

> The Defendant testified at his trial that he and his brother decided to leave Idaho because it got cold ... He further testified that his brother, Mark Lankford, decided to steal a van and talked Defendant into going along with the theft.... The Defendant testified that he never planned on shooting anyone, though he did carry the shotgun into the campsite at his brother's request.... He then testified that while he was talking to the man (Robert Bravence), Mark Lankford came out of the bushes and told the man to get down on the ground.... Mark Lankford then hit the man over the head with a club.... When Mrs. Bravence came up from the river, Mark Lankford told her to get down on the ground and upon doing so, Mark Lankford hit her across the back of the neck.... The Defendant and Mark Lankford then picked up the Bravences and placed them into the van. ... The Defendant then drove the van back to the Lankford's former campsite. ... Upon arriving at the area, the Defendant stayed in the car because he was "hysterical", "crying and very upset" while Mark Lankford took the people into the woods.... The Defendant did not think that the people were dead at the time that Mark Lankford carried them into the woods.... The Lankfords then drove to Oregon.... The Defendant further testified that he signed charge receipts at the Holiday Inn in Wilsonville and other places because his brother told him to do so.... The Defendant further testified that Mark did not generally get along with people because he was violent and had a very bad temper most of the time. Defendant's Brief, pp. 6-7.

The foregoing is excerpted from the Defendant's Brief. It compares favorably with the majority's recitation, pp. 691-692, 747 P.2d pp. 713-714.

There is here, then, no contention, and also no jury finding, that Bryan Lankford delivered any of the death blows.[2] The majority upholds the imposition of the death penalty upon being able to see validity in the judge's finding, as rewritten by the majority, that Bryan Lankford "intended that the Bravences die." This misstatement of what the trial judge actually wrote is blatant and inexcusable, but serves the majority's purpose in choosing language which the majority prefers to believe was what the district judge really meant to say—so as to be brought in conformance with *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140—which is barely mentioned in the majority opinion,[3] although it was thoroughly discussed in the *Windsor* majority opinion, *Windsor, supra*, 110 Idaho at 418-19, 716 P.2d 1182.

The majority closes its cursory proportionality review with a quotation from *State v. Aragon*, which is delivered much as a blessing might be:

> We acknowledge the trial court's superior ability to observe witnesses and their demeanor during the sentencing phase of a trial, and especially the unique ability of the trial judge to observe the character and demeanor of the defendant, a tool essential to the ultimate goal of tailoring a sentence to a particular defendant. With that unique ability of the trial court in mind, we have determined that the sentence imposed in the present case is not out of proportion to the sentence heretofore imposed. *State v. Aragon*, 107 Idaho 358, 369, 690 P.2d 293, 304 (1984).

The Court's opinions in the cases of *Windsor* and *Scroggins* failed to acknowledge

the trial court's superior ability, and did not keep in mind that "unique ability." To the contrary, the Court, in *Windsor* and also in *Scroggins*, came out with a "newly enunciated doctrine of" paramount exercise of discretion which resulted in a Supreme Court "'qualitative review' of the record" from which "the Supreme Court determined that the sentence of death in the *Windsor* and *Scroggins* cases were excessive and disproportionate." Those quotations are, of course, taken directly from the eloquent order of disqualification authored by the Honorable Edward J. Lodge, the district judge who presided in the *Windsor* case and also in the *Scroggins* case, where in both cases he had imposed a sentence of death. Judge Lodge wrote courageously and concisely on the requirement of proportionality, and this Court's debasement of that doctrine. And Judge Lodge wrote from a position where only he was best positioned to make an assessment that was direly in need of being made. He had also, using his own words, "accepted that awesome responsibility" in imposing the death sentence on Fetterly, who was Windsor's co-defendant charged, tried, and convicted for the murder of Sterling Grammer, and also in imposing the death penalty on Beam, who was Scroggins' co-defendant charged, tried, and convicted for the murder of thirteen-year-old Mondi Lenten. Because the issue presently under address is proportionality, and because on previous occasions I have been impelled to the view that Idaho will only achieve any degree of reasonable proportionality in capital sentencing by restoring to the jury "that awesome responsibility," it is clearly in order that in Judge Lodge's own words the circumstances of *Windsor* and *Scroggins* be submitted to a candid world:

> "Idaho Code Section 19-2827(c)(3) is seemingly clear in providing that the responsibility of this state's Supreme Court in reviewing a death sentence is to ascertain whether a death penalty is 'excessive' or 'disproportionate to the penalty imposed

an 'independent review.' With all due respect, it is difficult for this court to believe that such a 'qualitative review' undertaken by the Supreme Court is more legitimate than the trial court's assessment after having personally participated in all the proceedings and having had the firsthand opportunity to evaluate the facts, circumstances, and persons involved in a capital case, particularly when two members of the Supreme Court are predisposed to find against the legitimate imposition of a death sentence when it is prescribed by the court as opposed to a jury. Rather, the decision-making responsibility always has been and always should be in the trial court, and only when there is determined to be an *abuse* of that discretion should an appellate court intercede. The United States Supreme Court held in *Spaziano vs. Florida*, [468 U.S. 447] 104 S.Ct. 3154 [82 L.Ed.2d 340] (1984), that sentencing by a trial judge satisfied both the Sixth and Eighth Amendments because 'a trial judge is more like a jury than he is like an appellate court. Like a jury, he has seen the witnesses and is well positioned to make those determinations of demeanor and credibility that are peculiarly within a trial judge's province.' The same can be said for all the nuances involved in the trial of a capital case which are not 'in the record,' but which are within the observations and knowledge of the trial judge, including community outrage and/or tolerance, community expectations and societal goals, the rights and needs of a victim's family, and the totality of the circumstances surrounding the defendant.

"The records in the *Windsor* and *Scroggins* cases amply support the determination that both defendants *personally intended that their victims suffer death*, a finding made by both the trial court and the jury which satisfies the Eighth Amendment as well as the rule of *Enmund vs. Florida*, 45 [458] U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140] (1982). Yet, *even though findings regarding the personal responsibility and*

In this case, Lankford was found guilty of a savage murder against two innocent campers who were selected because they owned a van which the defendant intended to steal. Lankford came into their camp wielding a shotgun which must have ultimately led to Mr. Bravence's (who was a captain in the United States Marine Corps) subservient compliance with Lankford's brother's order to kneel on the ground where he was bludgeoned to death. Jurors could reasonably have inferred that Mr. Bravence complied with the demand to kneel on the ground because of the defendant's menacing display of the shotgun. After Mr. Bravence was mortally wounded, Mrs. Bravence returned from the creek. She was ordered onto the ground and unmercifully killed by a blow to the head without a word of protest from Lankford. Although Lankford testified that he did not intend that the Bravences die, Lankford not only participated in the murders, but he did nothing to prevent his brother from bludgeoning Mrs. Bravence after he had witnessed the savage consequences of the nightstick attack on Mr. Bravence. The attack was brutal and one that could only have been intended to kill the victims because of the severity of the blows. The district court judge was entirely justified in finding from these facts that Lankford was a major participant in the killings and that he intended that the Bravences die.

The character and nature of Lankford leads to the conclusion that he was an extremely dangerous person. The fact that the murders were committed while Lankford was in violation of parole on a robbery charge in Texas, and was fleeing from the authorities, indicated to the sentencing court that he has little respect for the law or for fellow human beings, and the record substantiates this finding.

Our review of similar recent cases demonstrates that Lankford's acts can be easily aligned with other Idaho cases in which the death penalty was imposed. In *State v.*

cases were not only brutal, but the defendants had, like Lankford, prior criminal records. In *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983), defendant viciously murdered his female victim who was a former co-worker. Sivak, like Lankford, had a prior criminal record. In these and other recent cases the aggravating circumstances surrounding the commission of the crime far outweighed any mitigating circumstances.

In *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984), we stated:

> "We acknowledge the trial court's superior ability to observe witnesses and their demeanor during the sentencing phase of a trial, and especially the unique ability of the trial judge to observe the character and demeanor of the defendant, a tool essential to the ultimate goal of tailoring a sentence to a particular defendant. With that unique ability of the trial court in mind, we have determined that the sentence imposed in the present case is not out of proportion to the sentence heretofore imposed." 107 Idaho at 369, 690 P.2d at 304.

We find that the trial court exercised this unique ability, understood the record in detail, and acted in accordance with Idaho statutory procedure to sentence the defendant to death.

The judgment of conviction and the sentence imposed are affirmed.

SHEPARD, C.J., and DONALDSON and HUNTLEY, JJ., concur.

HUNTLEY, Justice, concurring.

While concurring in the majority opinion, I do so with the reservation that I remain convinced that Idaho's death sentence procedure, in failing to utilize the jury in the process, violates the Idaho Constitution for the reasons I have stated in *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), and, *State v. Sivak*, 105 Idaho 900, 674 P.2d

death penalty only in appropriate cases can best be obtained when the decision to impose that penalty is made by a jury rather than by a single governmental official.

Judges should resist the constant temptation our offices present to arrogate power unto ourselves to the detriment of the jury system.

BISTLINE, Justice, concurring only in affirming the verdict and dissenting.

I.

The most important issue at stake here was the last dealt with in the majority opinion, Part IV(3): "Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[1] The majority, in its footnote 14, runs off its usual routine string of cases in support of its routine declaration that "we have reviewed the sentence imposed and the sentences imposed in similar cases in an effort to assume that the sentence in this case was not excessively disproportionate." Added to that string of cases for the first time, and prominently heading the list, are *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), and *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), *State v. Beam*, 109 Idaho 616, 710 P.2d 526 (1985), and *State v. Fetterly*, 109 Idaho 766, 710 P.2d 1202 (1985). The majority opinion, however, contains surprising little informing the reader as to what dispositions were made in the string of cases cited, and especially with regard to the two last cited, or how Lankford's death-deserving conduct measured up to the death-deserving and death-undeserving conduct in the string, other than this much:

> Our review of similar recent cases demonstrates that Lankford's acts can be easily aligned with other Idaho cases in which the death penalty was imposed. In *State v. Gibson*, 106 Idaho 54, 675 P.2d 33 (1983), and *State v. Paradis*, 106 Idaho 117, 676 P.2d 31 (1983), the nature

defendants were similar to this case. The murders in those cases were not only brutal, but the defendants had, like Lankford, prior criminal records. Majority op., p. 704, 747 P.2d, p. 726.

All that the majority does in its proportionality review is to portray the conduct of Lankford in connection with the killing of the Bravence couple from which it is concluded that: "The district court judge was entirely justified in finding from these [recited] facts that Lankford was a major participant in the killings and that he intended that the Bravences die." Majority op., at p. 704, 747 P.2d at p. 726. The majority opinion appears to be patterned after that of the Arizona Supreme court in its second review of the *Raymond Tison* case on post-conviction proceedings:

> Intent to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony. *State v. Raymond Tison*, 142 Ariz. [454] at 456, 690 P.2d [755] at 757 [1984].

Felony murder is first degree murder, and it can merit life imprisonment. Felony murder is not, however, necessarily premeditated first degree murder, which can merit the death penalty. The majority opinion correctly reports that the district court ruled that there was a specific intent to cause the deaths of the victims, BUT, the majority avoids taking note that the trial court was careful not to make a finding that such intent was attributable to Bryan Lankford and instead made this finding:

> (d) The murders were defined as murder of the first degree by Idaho Code Section 18-4003(d), and the murders were accompanied with the specific intent to cause the deaths of Mr. and Mrs. Bravence. R., p. 348.

That language, beyond any doubt, may

portionate to sentences imposed in similar cases. Our independent review of this case does not reveal any indication of existence of arbitrary factors. *Our review of similar cases involving the death penalty, while necessarily limited by the lack of such cases, as noted in State v. Creech, supra, does not reveal the presence of any particular excessiveness or disproportionality in this particular case.* The heinous nature of the crime committed in this case, and the nature and character of the defendant, makes the imposition of the death penalty in this case both proportionate and just. *Sivak, supra*, 105 Idaho at 908, 674 P.2d 396 (emphasis added).

But, the majority not at that time incorporating a string citation of cases reviewed, artfully ignored *State v. Major*, 104 Idaho 4, 665 P.2d 703 (1983, a first degree *premeditated* murder conviction—a brutal stabbing—where the death sentence was not imposed. Equally ignored was a companion case to *Sivak*, namely *Bainbridge, supra*, where the death penalty was not imposed. Nor can it be said in defense of the *Sivak* majority that omission of any comparison to *Major* and *Bainbridge* was inadvertent. My own opinion rather forcibly brought those other cases to the fore:

> It is difficult, if not impossible, to reconcile the two sentences. One murderer dies; the other lives. This is a classic case of the disparity in sentencing which produced *Furman* and in turn led to the second series of cases four years later wherein the Supreme Court declared that *Furman* had been misunderstood, while Idaho in the interim destroyed death penalty sentencing procedures which would today be entirely valid according to my own reading of the "threshold theory" which the Supreme Court now retreats to in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). I am not critical of Justice Stevens' opinion—which was expected. At the same time I agree with the view of Justice Marshall stated and written even prior to receiving *Zant*, Idaho's procedure in capital sentencing did not lead to arbitrary and capricious imposition of death sentences. Well instructed juries would hear evidence offered in mitigation and in aggravation, and would decide between life or death. Bifurcation of the guilt phase from the penalty phase would serve to avoid undue prejudice to a defendant charged with first degree murder. *Sivak, supra*, 105 Idaho at 914, 674 P.2d 396.

In that opinion, writing primarily for the education of the majority who did not seem to be aware of *Bainbridge*, the involvement of both Sivak and Bainbridge, highly similar to the joint involvement of Fetterly and Windsor, and also to the joint involvement of Scroggins and Beam, it was pointed out that:

> Two men, Sivak and Bainbridge, were found guilty of first degree murder which was committed in the course of a planned robbery of a gas station attendant who was acquainted with both and who could have identified both individuals. The attendant, a woman but a few years older than the defendants, was stabbed twenty times and shot three times—a brutal murder if ever there was one. The two were jointly charged, as they should have been, given a preliminary hearing, and held to answer. A single information was filed charging them jointly with armed robbery, premeditated murder, and murder in committing a felony of robbery, as they should have been charged. Neither made a motion for separate trial, apparently being unable to show the prejudice required by our case law, and they should have been tried together. But they were not so tried. One defendant, Bainbridge, filed an affidavit of disqualification against Judge Newhouse, who thereupon disqualified himself as to Bainbridge only, for which there may or

> defendants were not tried together as they should have been for the crimes the two of them committed, but the results of the guilt trials came out the same, as both were convicted of first degree murder. There is little doubt in my mind, after reviewing the facts and circumstances of the crimes, that had they been tried jointly and had the jury been the sentencer both would have suffered the same fate. But they were not tried together for their jointly committed crimes as they should have been, and a jury was not the sentencer as should have been the case. As it stands now, one dies and one lives. If this is not disparate sentencing, then I do not expect to ever see it.
>
> The two co-defendants were not only bungling criminals and inept, and thus brutal murderers, but also not loyal to each other. Sivak, who testified at his trial, claimed that Bainbridge did all of the robbing and murdering while he, Sivak, was merely in the company of Bainbridge at a poor time. Bainbridge, who did not testify at his trial, gave taped statements to the investigating officers which, on his turn to talk, blamed the entire criminal activity on Sivak, Bainbridge by misadventure merely happening to be with him at the wrong time and place, as it turned out. There were no other witnesses to the crime of murder than these two defendants. The two different juries convicted both of first degree murder and robbery, Sivak testifying to his innocence, Bainbridge not taking the stand. Neither testified at the other's trial. Notwithstanding like jury verdicts the district judges involved imposed the drastically different sentences for the same crime of murder. As acknowledged in the majority opinion in Part II B, Judge Newhouse in Sivak's case made a § 19-2515 finding that "[t]he defendant dominates his co-defendant and is primarily responsible for all that occurred." The majority, notwithstanding Judge Rowett in Bainbridge's case that "[a]lthough he had the opportunity and the encouragement of the co-defendant to do so, defendant did not himself inflict any death threatening wounds on the victim," and "that defendant did not himself deliver any death threatening blows to the victim...." *Id.* at 915-16, 674 P.2d 396.

Following which, on the issue of required proportionality, I added my assessment in regard to *Sivak* and *Bainbridge* which, I am gratified to be able to say now, is much the same as Judge Lodge's post-mortem review of *Windsor* and *Fetterly* following this Court's setting aside of the death penalty imposed on Windsor:

> Now, a large difficulty with these two cases and the disparity in penalties imposed, is an inability to see how it would make any genuine difference which of the two defendants delivered the more telling blows, knife wounds, or shots against and into their helpless victim. The cold inescapable fact is that *they* murdered her, and that the two district judges, neither of whom ever heard Bainbridge testify as to the circumstances of the crime, and only one who heard Sivak testify, could both to a degree exonerate Bainbridge at Sivak's fatal expense is regrettably to my mind unacceptable. Moreover, it highlights the bizarre results of having two separate trials where there should have been a single trial, and drives home the importance of adhering to jury death sentencing as is a defendant's right under the Idaho Constitution. *Id.* at 916, 674 P.2d 396.

Judge Lodge, where proportionality is involved, performed a great service for the State of Idaho in speaking out against this Court's disparate sentencing in *Windsor* viz-a-viz *Fetterly*, and in *Scroggins* viz-a-viz *Beam*. Had he also written of *Sivak* and *Bainbridge*, an even greater service would have occurred. It is, in my view, of extreme importance that this Court, and

equivalent to that imposed on their co-defendants, whose death sentences have been affirmed on appeal. Despite a record which strongly indicate that in their respective cases both Scroggins and Windsor were *the* motivating forces behind the commission of the crimes and were in fact the catalysts which set the crimes in motion, a situation has resulted which suggests that 'where the death of another is attempted by two people ..., he or she who was less successful must yield the hangman's noose to the one to whom must go the honor of inflicting the blow or wound which gains the medical credit for producing the victim's expiration.' 85 I.S.C.R. at 2566 (Justice Bistline's separate opinion). *In both cases it is clear that Windsor and Scroggins knew that the victim was to be killed and were actively and inextricably entwined in the victim's fate.* With the possible exception of the Creech cases, where there have been multiple deaths, this court is not aware of any murder case in this state where the death penalty has been upheld which would offend the average person more than the facts presented in *Windsor* and *Scroggins*.

"In the *Windsor* opinion the Supreme Court maintained that Windsor's level of participation in the crime was sufficiently different from that of her co-defendant Fetterly so as to justify the disparity in their sentences. Additionally, certain other factors were cited: her lack of formal criminal record; the lack of significant prior criminal activity; the lack of evidence regarding any history of violent behavior or propensity toward violence; her cooperation with authorities both after arrest and during incarceration; her troubled childhood; and her strong rehabilitative potential. *This review glossed over the facts of Windsor's actual involvement* in bringing about Sterling Grammer's death and instead emphasized the mitigating factors which were thoroughly considered by this court and found not to outweigh the aggravating factors.

Mondi Lenten, compared to that of co-defendant Beam, as well as his unstable upbringing, mental and chronological age, level of cooperation, and lack of history of violent criminal conduct. However, the record in this case supports the conclusion that any disparity between Scroggins' and Beam's participation is a distinction with little difference. It is true that the Scroggins jury did not find him guilty beyond a reasonable doubt of slitting his victim's throat, but neither did the jury so find in Beam's case; yet it most certainly happened, and both defendants are legally responsible. Additionally, while Scroggins was convicted of the included offense of Attempted Rape and Beam was convicted of Rape as charged, the *Scroggins* verdict must be viewed in light of the evidence. It is inconceivable to this court that Scroggins should be given any consideration in the sentencing process for the disparity in the verdicts when the only reasonable explanation for Scroggins' not accomplishing the rape, in light of all the other evidence, was that his victim, in a final and desperate measure, forced a bowel movement in the hope that the excrement would turn Scroggins away, and when the evidence indicates that he still forced her to commit an act of fellatio on him. Also, the fact that Scroggins reported the crime has to be viewed in context in order to see it for what it was. First, Scroggins when home and went to sleep with no pangs of conscience after having been involved in a brutal slaying. The next day, under parental influence, and with co-defendant Beam on the run and a handy 'fall guy,' Scroggins went to the police. No one involved in this case—police, investigators, the jury, or this court—has ever found or believed that Scroggins told the truth about what happened to Mondi Lenten, except to the extent that he did lead the police to the crime scene, which he of course had to do in his attempt to place the blame on Beam, his supposed friend. Additionally, while the Supreme Court's

> death sentence, a recent check with the warden of the Idaho State Penitentiary demonstrated that this court's assessment was borne out upon Scroggins' release from death row, whereupon his conduct caused him to be first placed in the 'hole,' and then in close or protective custody. Finally, this court carefully considered the mitigating factors identified by the Supreme Court in its opinion prior to determining at the time of sentencing that the mitigating factors did not outweigh Scroggins' culpability for the crime and the nature of his character.
>
> *"The crimes committed by both Scroggins and Windsor were accomplished under such circumstances that reasonable minds could not differ about the fact that there was in each case a knowing and final betrayal by the defendant of any respect for human life.* Even after a careful consideration of the mitigating factors in their respective cases, it was and still is the conclusion of this court that these mitigating facts do not outweigh the aggravating factors. While a defendant may demonstrate a change of heart once he or she is cornered, may become cooperative, may display some rehabilitative potential, and may work within the system to emphasize his or her good points and to obscure the bad ones, these factors in and of themselves must not automatically overshadow a defendant's culpability for the crime which has been committed and for the life which he or she has previously led, if there is to be any validity to the sentencing objective of protecting society in addition to serving the interests of a defendant. Further, where a court must give a disproportionate amount of weight to matters which occur after the commission of a crime, *there never will be proportionality in sentencing between the advantaged and the disadvantaged.*"
>
> Order of Disqualification, *State v. Windsor* and *State v. Scroggins*, pp. 3-10 (emphasis added).

The majority makes much of Windsor's childhood and her background in general. All of these factors were first considered by the trial judge. The fact remains that, just as the judge observed, two people, Windsor and Fetterly, set out together on this crime spree which culminated in the death of their selected victim. This is not an *Enmund* situation—not even a distant cousin of *Enmund*.

and, at page 432, 716 P.2d 1182;

> Here we have no driver of a get-away car—completely detached from the scene of a murder-in-progress. Hence, I see no necessity for the majority's considerable exertion in reaching the conclusion that "there is no merit to Windsor's contention that the imposition of the death penalty was constitutionally impermissible under the mandate of *Enmund*.

The majority, in its *Windsor* opinion, nevertheless found justification for allowing her to escape the death penalty which had also been meted out to Fetterly, and *affirmed*, in the disparate sentences imposed on Bainbridge, *State v. Bainbridge*, 108 Idaho 273, 698 P.2d 335 (1984), and Sivak, *State v. Sivak*, 105 Idaho 990, 674 P.2d 396 (1983), and likewise the sentences imposed on McKinney, *State v. McKinney*, 107 Idaho 180, 687 P.2d 570 (1984), and Small, *State v. Small*, 107 Idaho 504, 690 P.2d 1336 (1984):

> In both sets of cases, the defendant who did the actual killing was given the death penalty while his co-defendant received a life sentence. The difference in their degree of participation in the crime appeared to be the primary factor justifying the disparity in sentences in both sets of cases. *Windsor, supra*, 110 Idaho at 421, 716 P.2d 1182.

The majority in *Sivak* upheld the imposition of the death penalty, and had the effrontery to observe that:

> I.C. § 19-2827 requires us to conduct a review of the record to determine if this particular death sentence resulted from

Q. And how was it that one particular story got prepared in writing?

A. Well, the first story Mr. Bryan Lankford told was that he and his brother Mark had gone from the Houston area to Canada where Mark's car had been stolen. That they'd gone to Canada in Mark's car and it had been stolen. That didn't wash, I didn't believe it. I pointed out that Bryan's fingerprints had been found in the Bravence van, and he had to have been in it at one time or another, and he said: Okay. The second story was that: yeah, we up there, we were camping in Idaho. We didn't want to use Mark Lankford, my brother's car anymore, so I stayed in the camp, Mark left for a few hours, came back with a green van and we went on.

And I told him that wouldn't wash because his handwriting and fingerprints had been found on credit card receipts and so forth from the use of the Bravence credit card. The second time he said: Okay. I'll tell you the truth, the whole story. And that's when we started the signed that statement.

Q. And how did you go about preparing such signed statement?

A. I set out and lettered out in narrative form. I'd say: Well, what happened next.... and I'd write a sentence, and then say: What happened next.... and I just set and wrote it out. And at the end he read it and accepted my words, if you will, and signed it and wrote a little paragraph at the end of it.

Q. This document is in your longhand?

A. Yes, sir.

Q. And it bears some of his longhand?

A. Yes, sir.

Q. Did he have an opportunity to look at each page?

A. Yes, sir. He read and initialed [illegible] and signed the last page.

Q. Calling to your attention what's been marked for identification as State's Exhibit No. 76, what is that?

A. This is the signed statement we prepared on October the 7th, 1983, at Liberty County, the one that Bryan Stuart Lankford furnished to me.

Q. How many pages is it?

A. Six pages.

Q. Do you recognize each of the six pages?

A. Yes, sir. My handwriting is on each of the six pages.

Q. You indicated there were initials of Bryan Lankford on the pages, where do those appear?

A. Yes, sir. They appear at the top left where each page was started, at the bottom right where each page was ended.

Q. On the last page does there appear any handwriting of Bryan Lankford?

A. Yes, sir. On the last page Bryan's initials appear at the top left. He signs it at three quarters of the way down the page; and, then, I signed it as Larry Allen did as witnesses to the statement.

Q. Is there a discernible change in the handwriting?

A. Yes.

MR. ALBERS: Move the admission of Exhibit No. 76.

MR. LONGETEIG: No objection.

THE COURT: 76 will be marked into evidence.

(Thereupon State's Exhibit No. 76 was marked into evidence by the deputy court clerk.)

BY MR. ALBERS:

Q. Mr. Ploeger, since this is in your handwriting, could you read that for us?

A. Yes, sir: Liberty, Texas, October the 2d, 1983, I Bryan Stuart Lankford make the following free and voluntary statement to Federal Bureau of Investigation Special Agent Dennis L. Ploeger.

vice of Rights that I read, understood, and signed.

I finished the eleventh grade in school, got a GED certificate, and can read and write the English language.

Sometime in early June, 1983 Mark Lankford, my brother, came to Conroe, Texas where I was staying with my uncle, Kenneth Lankford, at 117 Lidian (phonetic) Street. I was planning to leave the area, and I called Mark to tell him I was leaving. Mark said he was going to leave the area also, so he came to Conroe from Houston, Texas, where I called him, and we left Conroe together.

We traveled in Mark's brown Chevrolet Camaro Z28, and Mark did all the driving. I had money for gas. We went through Oklahoma, Kansas, Wyoming, and possibly one or two other states before arriving in Idaho. Mark and I camped between Golden and Elk City, Idaho when we got to Idaho. We were at the camp that is off a dirt road on the side of a mountain in the woods. It was high on the mountain, and it snowed every day. After about two weeks Mark and I decided to leave the area. We had hidden Mark's car under brush near our campsite earlier. Mark wanted to leave the car because it had Texas license plates and he was afraid that he would be stopped, and he had not been making payments on the car.

We left all our personal belongings in the car except for a small bag of clothes and a twelve gauge longtom shotgun, that I carried. We left the camp and were walking down the dirt road from the camp when a white man in tan Jeep picked us up and took us to the main road. We walked towards Golden, Idaho until we came to a campsite where a green VW van was parked. Mark said there was a easier way to travel than walking, and after about an hour of discussion, we decided to steal the VW van for transportation.

Mark and I walked into the camp ground. The man did not get on the ground, but said take the money and the van and something like don't hurt us. Mark then hit the man over the head with a night stick, like a policeman uses. He had the night stick for a long time, and carried it in his car. The woman came up from a nearby creek about that time, and Mark told her to get on the ground. She said something about her husband being hurt on the ground; and, then, she got on the ground. Mark then hit the woman over the head with the same night stick that he had hit the man on the head with. I don't remember if Mark hit the man or woman once or more than once.

He then—we then put the camping gear of the man and woman into the VW van. The man and woman had a dog, but we left the dog at the campsite. We then put the man and woman on the floor in the back of the VW van. It took both Mark and I to put them into the van. I then drove the VW van back to where Mark and I had been camped. Mark got out and took the man and woman out the side sliding door of the van and drug them off into the woods. I stayed in the van. Mark wanted to take the man and woman back to our old campsite. I am not certain, but we may have picked up some of our belongings. I don't remember any discussion about hiding the man and woman. I didn't know if the man and woman were dead when we took them to our old campsite. After that it was the middle or latter part of June, 1983 when Mark and I got the van and Mark hit them with the night stick, we went to Oregon; and, then, California in the van that belonged to the man and woman.

We used a Master Charge credit card in the name Robert Bravence, that we got from the glove box of the van, to buy gas, clothing, and at restaurants. I signed the receipts when we used the

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this Court's reversal of a death sentence imposed by him, *see State v. Osborne*, 104 Idaho 809, 823, 663 P.2d 1111, 1125 (1983) (Bistline, J., concurring and dissenting), only Judge Lodge has let his views be known, and then only when his conscience so motivated him. It is to be remembered that only in recent years have the state's district judges had thrust upon them that "awesome responsibility." In speaking out against this Court's reversal of the death sentence in *Windsor*, Judge Lodge noted that, in evaluating the wisdom of appellate court sentencing, "a trial judge is more like a jury than he is like an appellate court. Like a jury, he has seen the witnesses and is well positioned to make those delineations of demeanor and credibility that are peculiarly within a trial judge's province." He was quoting from *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). Because a jury is more like a jury than is a trial judge like a jury, and speaking as one member of this Court, I express the view that everyone involved in capital sentencing, at whatever level, would greatly benefit if the views of Judge Lodge were made available, together with those of all the state's district judges, on the appropriate comments of United States Supreme Court Justice John Paul Stevens, also writing in *Spaziano*, and joined by two other justices. His beliefs are more readily available in *State v. Stuart*, 110 Idaho 163, 179–81, 715 P.2d 833, 849–51 (1985) (Bistline, J., dissenting). In sum, Justice Stevens stated it thus:

"In the 12 years since *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense. Because it rage—its sense that an individual has lost his moral entitlement to live—I am convinced that *the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury rather than by a single governmental official.* This conviction is consistent with the judgement of history and the current consensus of opinion that juries are better equipped than judges to make capital sentencing decisions. *The basic explanation for that consensus lies in the fact that the question whether a sentence of death is excessive in the particular circumstances of any case is one that must be answered by the decision maker that is best able to 'express the conscience of the community on the ultimate question of life or death.' Witherspoon v. Illinois*, 391 U.S. 510, 519, 88 S.Ct. 1770, 1775, 20 L.Ed.2d 776 (1968) (footnote omitted).

....

"Thus, the legitimacy of capital punishment in light of the Eighth Amendment's mandate concerning the proportionality of punishment critically depends upon whether its imposition in a particular case is consistent with the community's sense of values. Juries have historically been, and continue to be, a much better indicator as to whether the death penalty is a disproportionate punishment for a given offense in light of community values than is a single judge. If the prosecutor cannot convince a jury that the defendant deserves to die, there is an unjustifiable risk that the imposition of that punishment will not reflect the community's sense of the defendant's 'moral guilt.'" *Spaziano, supra*, 104 S.Ct. at 3167–78 (footnotes omitted). *State v. Stuart*, 110 Idaho 163, 179–81, 715 P.2d 833, 849–51 (1985) (emphasis added).

That which is also missing from the majority opinion is any discussion comparing Bryan Lankford's conduct with that of his

considered as it was by the majority in *Windsor, i.e.*, her culpability as compared to Fetterly's, or should it be as it is today, comparing the murder of the Bravences in relation to the murders perpetrated by Paradis and Gibson? On this sad state of affairs, I continue to find appropriate my final remarks in the *Stuart* case:

As I wrote in *Sivak* or *Bainbridge*, the proportionality requirement prescribed by the Supreme Court and in turn adopted by the Idaho legislature is virtually meaningless. Proportionality in capital sentencing in Idaho will only result *when first degree murder charges are all tried to a jury*, and the jury also as the conscience of the community makes the awesome decision of life or death where a first degree murder verdict is returned.

How there can ever be any real proportionality continues to escape me where prosecutors exercise a divine right to reduce the charge and to ask or not ask for the death penalty, as may at the moment so move them. Recently, the citizens of Ada County were given to understand that the prosecutor had decided that on a guilty plea to the execution-style murder of a girl in her twenties, *he* would not ask for the death penalty. Other defendants so accused do not fare so well. Such matters are not for mortal prosecutors, but for mortal jurors. *Id.* at 202, 715 P.2d 833 (emphasis original).

With Windsor, Scroggins, Bainbridge, and Osborn having escaped the death penalty by reason of the (erroneous) grace of this Supreme Court, how is it that in the name and pursuit of proportionality, the remittiturs are not recalled and proportionality meted out as it should be. Precedent is not lacking. *State v. Ramirez*, 34 Idaho 623, 203 P. 279 (1921), which was discussed most recently in *State v. Stuart*, 110 Idaho at 228–29, 715 P.2d 833 (Bistline, J., dissenting on rehearing).

II.

ment in passing. Putting aside the loose use of "confessions," "admission" and "statements" as though the same are interchangeable, it would seem to me that if the majority has found in this voluminous appeal record any confession by Bryan Lankford to his killing of either of the Bravences, it would be put on display without the least hesitation, just as the majority did, and accurately set out a synopsis of his testimony at trial. Where the majority asserts that there are such confessions, admissions, and statements without any elaboration or explanation as to content, it can only be assumed that it is a ployful play on words. The robbery was undoubtedly what led to the killings, hence, if Bryan Lankford conceded his complicity in the robbery, which he did by his own testimony, the majority is able to leave the reader believing that his statements, admissions, and confessions were that he participated in the killing. Seeing no reason for such shenanigans in writing a decision in a death penalty case, with some trouble I have located the oral recitation of the "written confession to an FBI agent." Working in Texas, he became aware that the Bravences were missing, and last seen in Idaho, and ultimately got involved with Bryan and Mark Lankford at the sheriff's office in Liberty County, Texas, where the two Lankfords were jailed. He testified only as to his interview with Bryan and a *statement* signed by him, and the discussion which led up to it. The statement was marked as Exhibit 76, admitted into evidence by the court, there being no objection, but Exhibit 76 does not seem to be amongst the exhibits. Mr. Ploeger, the agent, read it in giving his testimony after first detailing how it was procured:

BY MR. ALBERS:

Q. Let's try again. How did the interview progress? What happened within the interview?

A. Okay. I interviewed him told him

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rereading what I had to say in some of the other death penalty cases, it is seen that both Judge Lodge and myself are vindicated in our views on capital sentencing, and particularly culpability and intent.

I cannot believe that Beam absent Scroggins would have murdered their helpless victim. Nor can I believe that Fetterly absent Windsor would have murdered their helpless victim. Nor can I believe that Sivak absent Bainbridge would have murdered their helpless victim. Two people conspiring to commit a crime are essentially of the same temperament as a small lynch mob—doing in concert what one would not attempt alone.

In sum, I continue to agree with Justice Huntley that under the *Idaho* Constitution capital sentencing by a jury is required—a proposition weakly challenged by Justice Bakes and avoided by every other jurist in Idaho, and yet to be addressed by the solicitor general, who obviously *favors* judge sentencing—having authored the death penalty sentencing provisions adopted by the Idaho Legislature in the aftermath of *Furman* and *Woodson*. I entertain no doubt that Bryon Lankford is properly found guilty of felony murder, and that the verdict and judgment should be affirmed. Because the two Lankfords share an equal complicity in the planned robbery which culminated in two senseless murders—where there was obviously more regard for a dog than there was for human life, had the jury been given defendant's requested Instruction No. 4, or something similarly worded, and had the jury answered in the affirmative, my vote would unhesitatingly be to uphold the imposition of the death penalty. Had the jury been the sentencing authority as it is in 95% of the 50 states, my vote would be to affirm the death sentence, even though there may be here a lower "degree of participation in the crime" (*see* the rule of *Windsor, supra*, at 708–709, 747 P.2d at 730–731) on the part of Bryon Lankford than there was on the part I would be more amenable to a majority opinion which did not leave standing in place the ratio decedendi by which the majority left Fetterly to be executed, while sparing Windsor, and left Beam to be executed while sparing the far more culpable Scroggins. Had the trial judge recited firm evidence from which he was able to say not just that "the murders were accompanied with the specific intent to cause the deaths of Mr. and Mrs. Bravence," but that Bryan Lankford himself was possessed of that specific intent, and were not the *Tison* case seemingly standing in the way, I could vote to affirm the death penalty, reserving only the proposition that the Idaho Constitution requires that the sentencing function be performed by a jury.

An unfortunate aspect of this case, as in the murders by Sivak and Bainbridge, and as in the murder by Scroggins and Beam, is the separate trials of the two defendants. They were jointly charged, had a joint preliminary hearing, and as I remember it, were named as co-defendants in the initial information filed in district court. The record does not contain an order of severance or a motion for severance, and there appears to be no involvement of any confessions to murder which would require application of the *Bruton* rule. It would seem to me that here, as in the Sivak-Bainbridge murder, and in the Scroggins-Beam murder, and likewise the Fetterly-Windsor murder, where there were no eye-witnesses other than the defendants, a single jury would not only have been better suited to decipher the truth, but to make the assessment of the "degree of participation in the crime," and impose the penalty—which would likely be highly proportionate.

the traveler's checks that we got from the glove box of the van that were in the name Robert Bravence. Some of the traveler's checks had a woman's name, so we threw them away. I don't remember if I threw them away or if Mark did, but we probably threw them away somewhere in San Francisco, California because it was the first big city we went into. I don't remember the name of any specific gas station, clothing store, or restaurant where we used the credit card or the traveler's check. But we purchased food, clothing, and gas with these items.

When we got to Los Angeles, California I called Roy Ralmuto in San Antonio, Texas, and told him that Mark and I wanted to come stay with him. He sent us two bus tickets, and we went to San Antonio the last of June or early July, 1983. While I was waiting for the bus tickets Mark took the VW van, and later said he left it on the street with the keys in the can.

I have not talked to anybody about the above activity with the man and woman. I never called the Sheriff or anybody in Idaho to tell them where the man and woman were or that they may need help.

I don't remember what Mark did with the night stick after he hit the man and woman. He may have left it at the campsite of the man and woman. He may have taken it back to where we had camped earlier. Or he may have thrown it out somewhere between the two camps. I believe we left the long tom shotgun I had at the camp of the man and woman in the VW van when it was abandoned in Los Angeles, California. We probably threw the credit card away.

And in Bryan Lankford's handwriting: I have furnished this six page statement free and voluntary. No force, threats, or promises were used to influence me to make the statement. I signed below and have initialed the other five pages.

MR. ALBERS: No further questions. Tr., Vol. 3, pp. 524–32.

The "confession" as I read it is not as inculpatory as to Bryan Lankford's involvement in the robbery as his trial testimony. As to murders, it is only inculpatory as to the carrying of the shotgun by Bryan Lankford, and portrays Mark Lankford as killing Captain Bravence while he was on his feet pleading to be robbed only, and in turn killing Mrs. Bravence when she knelt to tend to her stricken husband. I do not agree with that statement being characterized as a written confession regarding the killings. A confession is generally defined as a statement acknowledging guilt of the offense charged. *See* Black's Law Dictionary, Fifth Ed., p. 269, where is also explained the distinction between a statement and a confession.

III.

A major concern is caused by the majority's handling of the court's failure to give defendant's Requested Instruction No. 4, set out in the opinion at p. 694, n. 4, 747 P.2d at p. 716, n. 4, and for facility of reading repeated here:

DEFENDANT'S REQUESTED INSTRUCTION NO. 4

. . . .

Answer this question only if you find the defendant, Bryan Lankford, guilty of Murder in the first degree.

Do you find, beyond a reasonable doubt that Bryan Lankford himself killed, attempted to kill, or had any intent to kill either of the victims in this case?

The majority turns aside the challenge on the premise, unspoken, that it is irrelevant. Says the majority, "In Idaho it is the judge and not the jury who makes the determination of whether the death sentence will be imposed." What the majority necessarily must concede, however, is that this is a close case. The district court did *not* make

ford's conduct, having by the time of Bryan Lankford's sentencing presided over both trials,[1] was this:

(d) The murders were defined as murder of the first degree by Idaho Code Section 18-4003(d), and the murders were accompanied with the specific intent to cause the deaths of Mr. and Mrs. Bravence. R., p. 348.

That is not by any stretch of the imagination the equivalent of a district court finding which, if the court found from the evidence, could have been couched in this suggested language: Bryan Lankford, although he himself was not the slayer of either of the victims, had the intent that the victims would be killed. Nor is it a finding that Bryan Lankford himself killed either of the victims, or attempted to kill them.

It would seem that there was no valid reason for the trial court's refusal to give the requested instruction. At the least, the consensus of the jury, who had heard the same evidence, would be, and should be, of great moral support when the court arrived at the moment of awesome responsibility when had to be made the decision between life and death. Moreover, the defendant was placing all the marbles on the line in asking for that instruction. If the defendant was willing that the consensus of the jury might have been a *yes* answer, the court would have been spared some, if not much, of the agonizing of which District Judge Oliver lamented in *State v. Osborn, supra*, when he refused to conduct a second sentencing hearing, but instead imposed a life sentence without complying with this Court's mandate on reversal and remand.

There is no rule or principle which, even under the solicitor general's scheme for capital sentencing adopted by the legislature, nothing which forbids a district judge from getting advisory verdicts from a jury—much the same as is commonly and properly done in equity cases. And, notwithother times, pre-*Furman* and pre-confusion, when the court instructed the jurors on the law and to the jury fell the awesome responsibility of imposing either a death or life sentence. District judges are sworn to uphold the Idaho Constitution, and while not free to disregard a majority opinion from this Court, are free to have and express their own views. If ever before *Furman* and *Woodson* there was any public or district judge clamor in Idaho to do away with jury sentencing in capital cases, it escaped the attention of anyone I know, and my own as well.

CONCLUSION

The extent of Bryan Lankford's participation in the actual killing will probably never be known. What is known is that he was a participant in the robbery and carried a shotgun. It can be said, too, that he watched the killings, after which he aided his brother Mark Lankford in removing the bodies. It cannot be said on this record that he is bound by the state of mind of his brother. The Supreme Court of the United States in *Tison* set the proper guideline for the sentencing of Bryan Lankford.

> A critical facet of the individualized determination of culpability is the mental state with which the defendant commits the crime. . . . A narrow focus on the question of whether or not a given defendant "intended to kill," however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. . . . Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

As I read again that which Judge Lodge

APPENDIX B

1989 Opinion No. 46

IN THE SUPREME COURT OF THE STATE OF IDAHO
Nos. 15760-16170

STATE OF IDAHO,	)	
	)	
Plaintiff-respondent,	)	Moscow term, October 1988
	)	
v.	)	Filed: April 4, 1989
	)	
BRYAN STUART LANKFORD,	)	Frederick C. Lyon, Clerk
	)	
Defendant-appellant.	)	

On remand from the Supreme Court of the United States.

The Supreme Court of the United States, having vacated our prior decision in this matter which affirmed appellant's conviction and death sentence, remanded the case for further consideration. Affirmed.

Joan M. Fisher, Genessee, Idaho, for appellant.

Hon. Jim Jones, Attorney General; Lynn E. Thomas, Solicitor General, Boise, Idaho, for respondent. Mr. Thomas argued.

BAKES, J.

This matter is before us on remand from the Supreme Court of the United States. That Court vacated our decision affirming Bryan Lankford's conviction and death sentence, *State v. Lankford*, 113 Idaho 688, 747 P.2d 710 (1987), and remanded for further consideration in light of its recent decision in *Satterwhite v. Texas*, 486 U.S. ___, 108 S.Ct. 1792 (1988). *Lankford v. Idaho*, 486 U.S. ___, 108 S.Ct. 2815 (1988). After further consideration we again affirm the judgment of conviction and sentence imposed.

I

Our decision on remand requires us to analyze the United States Supreme Court opinion in *Satterwhite*. The Court began its opinion with the following:

> "In *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), we recognized that defendants formally charged with capital crimes have a Sixth Amendment right to consult with counsel before submitting to psychiatric examinations designed to determine their future dangerousness." 108 S.Ct. at 1794-1795.

The Court in *Satterwhite* further stated:

> "We granted certiorari to decide whether harmless error analysis applies to violations of the Sixth Amendment right set out in *Estelle v. Smith*." 108 S.Ct. at 1796.

The Court in *Satterwhite* held that the harmless error analysis does apply.

In this case Lankford did not raise the issue of a sixth amendment violation either at trial or on appeal. Accordingly, this issue is waived. *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639 (1986); *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497 (1977).[1]

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[1]We also note that there is no evidence of any sixth amendment violation in this case. During Lankford's trial he was represented by counsel and voluntarily chose to testify in his own defense. His testimony on direct and cross examination was extensive, describing not only his latest version of the killing of the Bravences, but also describing how he and his co-defendant brother, Mark, left Texas and came to Idaho. Lankford related details of the killings, placing blame primarily on Mark, and also related their theft and use of the Bravences' van and credit cards, which the two brothers used to make their way back to Texas.

After Lankford's conviction, but before sentencing, his counsel approached the prosecutor offering his client's testimony in Mark's

(continued...)

II

Lankford also argues that his fifth amendment privilege against self incrimination was violated when the trial court referred in sentencing to Lankford's testimony at the hearing for Mark's new trial motion. In its "FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER SECTION 19-2515, IDAHO CODE," the trial court considered the objective of "rehabilitation" and noted:

> "The defendant has shown no remorse for his offenses. He has not cooperated with authorities after his arrest. He has told authorities that he and his brother had nothing whatsoever to do with the death of the Bravences. He has testified that his brother was alone involved in the murders. He has testified (On October 10, 1984, in the companion case, State v. Mark Lankford, Idaho County Case No. 20158) that he called the Lewiston Tribune and claimed that it was he alone who murdered the Bravences[.] [T]his he later denied and offered the explanation which is set forth in the addendum to the presentence investigation report under date of October 3, 1984, to the effect that it was simply part of a plan that would secure freedom for his brother who could in turn free him.
>
> "Suffice it to say that defendant has failed to take any responsibility whatsoever for his actions. This court specifically finds that the defendant has no capacity for rehabilitation."

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[1](...continued)
upcoming trial, in exchange for immunity from future prosecutions for the charges of robbery and fraudulent use of the credit cards. An immunity agreement was approved and executed by Lankford and his counsel in open court. At every step of his brother's trial Bryan Lankford was represented by counsel. Later, Lankford was subpoenaed as a witness at a hearing on Mark's motion for new trial and was represented by counsel at every step of that proceeding.

Accordingly, there is no evidence in the record that Lankford's sixth amendment right to counsel was violated, unlike the situation in *Satterwhite*.

Assuming that *Satterwhite* applies equally where a fifth amendment violation is shown, as distinguished from a sixth amendment violation, we now analyze the fifth amendment issue since it was adequately raised on direct appeal and therefore was not waived.

As we stated in our original opinion, footnote 7, there is no factual predicate for a fifth amendment violation. Footnote 7 states:

> "7. Lankford asserts that the district court judge used the immunized testimony in its findings of fact to support the imposition of the death penalty. However, the record does not support that assertion. While the district court described Lankford's testimony at his brother's motion for new trial in its sentencing memorandum, it was not considered as an aspect of any of the statutory aggravating circumstances found by the court. During the district court's oral discussion of the sentence, the judge stated:
>
> > 'The defendant has shown no remorse for his offenses. He has not cooperated with authorities after his arrest. He has told authorities that he and his brother had nothing whatsoever to do with the death of the Bravences. He has testified that his brother was alone involved in the murders. He has testified on October 10, 1984 in the companion case, State v. Mark Lankford, Idaho County Case No. 20158, that he called the Lewiston Tribune and claimed that it was he alone who murdered the Bravences. This he later denied and offered the explanation which is set forth in the addendum to the presentence investigation report under date of October 3, 1984, to the effect that it was simply part of a plan that would secure freedom for his brother, who could in turn free him.'
>
> "Although it is true that the district court judge pointed out the conflicting testimony given by Lankford at various times, including the testimony given pursuant to the immunity agreement, there has been no showing that the sentence was based upon the comments quoted above."

After further review of the "FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER SECTION 19-2515, IDAHO CODE," we

continue to adhere to the view expressed in footnote 7 of our original opinion. Accordingly, we find no factual predicate for Lankford's claim.

III

Even if we assume that the trial court considered Bryan's testimony at Mark's motion for new trial in arriving at Bryan's sentence, this consideration does not constitute a violation of the fifth amendment. Lankford's testimony at his brother's hearing for new trial related a version of facts given twice previously, once voluntarily at his own trial and again at Mark's trial pursuant to the immunity agreement. That testimony, as the trial court noted, was that "his brother was alone involved in the murders." This differed from Lankford's original version, that neither were involved. The whole basis of Mark's motion for new trial was that Bryan Lankford telephoned a local newspaper, the Lewiston Tribune, recanted his previous testimony and asserted, as the trial court noted, "that it was he [Bryan] alone who murdered the Bravences." By the time the motion was heard, Bryan Lankford had recanted the version he gave to the Lewiston Tribune, and reasserted the version he gave at his own trial and at his brother's trial.

The trial court's only reference at sentencing to Bryan Lankford's testimony given at the hearing on Mark's motion for a new trial, was to note the recurrent changes in Bryan Lankford's story. The trial court did not believe the substance of Bryan's Tribune story - that he alone committed murder. In denying Mark's motion for new trial, the trial court stated:

> "I'm satisfied that the new evidence that does consist of the statement by Bryan Lankford to the effect that he was totally responsible for the death or deaths of the Bravences was false. That particular statement was merely a product of depression, an effort, perhaps to get attention, certainly an effort to get out of trouble or to avoid punishment for what he did, and it is a very real possibility that two involved in a crime such as this, after they are both convicted of first degree murder, could tell then, different stories

> to help one get a new trial and, then, the other one could help the other get a new trial and certainly eventually hope for the acquittal of both or the acquittal of one."

The only consideration given to Lankford's testimony at Mark's new trial proceeding was that it again supported the trial court's observation that Lankford had not taken responsibility for his actions as evidenced by his repeated attempts to upset the course of justice by constantly changing his story, which damaged his credibility in the eyes of the court.

When Bryan Lankford, while represented by counsel, voluntarily took the stand in his own defense, testified at length concerning the entire transaction, and was cross examined, he effectively waived any immunity he had under the fifth amendment with respect to the subject matter of the testimony he gave. *Harrison v. United States*, 392 U.S. 219, 88 S.Ct. 2008 (1968). Having thus waived any privilege against self incrimination, the trial court could consider at sentencing the fact that Lankford was continually giving false testimony under oath, by his ever changing version of the facts. As the trial court noted, Lankford, by continuing to change his story, "failed to take any responsibility whatsoever for his actions." To the trial court, Lankford's continual testifying falsely under oath evidenced a scheming on his part which demonstrated a lack of "capacity for rehabilitation."

Lankford argues that the sentencing was a proceeding entirely separate from his trial and that he can therefore reassert his waived privilege. However, if a defendant has previously waived his privilege against self incrimination by voluntarily testifying at trial, that waiver continues into sentencing with respect to the testimony voluntarily given at trial. *See Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866 (1981). *See also Harrison v. United States*, 392 U.S. 219, 88 S.Ct. 2008 (1968); *cf. United States v. Houp*, 462 F.2d 1338, 1340 (8th Cir. 1972) ("Once the privilege is effectively waived, the information given is admissible at any subsequent trial," *citing Harrison v. United States*, 392 U.S. 219, 101 S.Ct. 1866 (1981)); *Neely v. State*, 292 N.W.2d 859, 864 (Wis. 1980) ("[A] defendant who takes the stand in his own behalf cannot then claim the privilege against cross examination on matters reasonably related to the subject matter of his direct examination," *citing McGautha v. California*, 402 U.S. 183, 215, 91 S.Ct. 1454, 1471 (1971).

Neither Lankford's immunity under the agreement nor his privilege against self incrimination prevent the trial court from considering at sentencing his lack of credibility resulting from his inconsistent and false testimony in the several proceedings prior to sentencing. There is no protected right to commit perjury either under the fifth amendment, *United States v. Wong*, 431 U.S. 174, 97 S.Ct. 1823 (1977); *Glickstein v. United States*, 222 U.S. 139, 32 S.Ct. 71 (1911), or pursuant to I.C. § 19-1115.

Accordingly, since the testimony Lankford gave at the hearing on his co-defendant brother's motion for new trial involved the same transaction and the same matters which he voluntarily testified about in his own defense on his own case, there was no fifth amendment immunity available to him with respect to these matters, and there could be no fifth amendment violation. Assuming that the United States Supreme Court's decision in *Satterwhite* applies to fifth amendment as well as sixth amendment claims, it still has no application to this case because there was no fifth amendment violation. Accordingly, we need not reach the *Satterwhite* "harmless error" analysis. We reaffirm our prior decision in this matter.

IV

As an alternative and independent ground for our decision, we hold that even if Lankford had not testified at his own trial, thereby waiving immunity under the fifth amendment, the immunity agreement which he and his counsel proposed and voluntarily entered into was sufficient to waive his fifth amendment privilege against self incrimination with respect to testimony given at Mark's trial and hearing on motion for new trial.

V

Lankford has again raised other issues of state law previously raised on direct appeal. Our prior opinion, *State v. Lankford*, 113 Idaho 688, 747 P.2d 710 (1987), resolved all those other issues against Lankford and those other issues are the law of the case and final. *Rawson v. United Steelworkers of America*, ___ Idaho ___, ___ P.2d ___ (1988) ("[S]ince the United States Supreme Court has jurisdiction only to require our reconsideration of matters involving federal law, our decisions [on state law issues] remain the law of the case and we decline to reopen them under certiorari procedure.").

We reaffirm our prior decision.

SHEPARD, CJ., and HUNTLEY, J., concur.

JOHNSON, J., concurring and dissenting.

I concur in part V, but dissent from parts II, III and IV of the majority opinion. In my view, Lankford's fifth amendment rights were violated by the trial court's reliance at sentencing on Lankford's testimony at the trial of Lankford's brother and at the hearing on his brother's motion for a new trial. The testimony at the brother's trial was given by Lankford after an immunity agreement had been approved by the trial court. The testimony at the hearing on the brother's motion for a new trial was given by Lankford after the trial court had accepted an agreement by defense counsel and the prosecutor that Lankford's testimony would be used only for the purposes of his brother's motion for new trial. I would hold that under Satterwhite v. Texas, 486 U.S. ___, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988) this violation was not harmless error.

LANKFORD'S IMMUNIZED TESTIMONY AND ITS USE IN SENTENCING.

Lankford and the prosecuting attorney entered into an immunity agreement concerning his testimony at his brother's trial. The agreement recited that Lankford would refuse to answer questions if he were called to testify, on the ground that he might incriminate himself. The agreement granted Lankford immunity "from

prosecution and penalty co-extensive with Idaho Code § 19-1114." The trial court found that there was "good cause" for the agreement and approved it. At his brother's trial Lankford testified that his brother killed the Bravences.

After his brother was convicted, Lankford was called to testify at a hearing on his brother's motion for a new trial. His attorney told the trial court in that hearing that on the basis of the fifth amendment she had advised Lankford not to testify. She said that she did not want him testifying on matters to which he had testified previously, because she did not believe that his testimony at his brother's trial was voluntary, but was coerced. After extended discussion between the trial court and counsel, the trial court accepted the agreement of the prosecuting attorney and Lankford's attorney that Lankford's testimony at the hearing would be used for purposes of his brother's motion for new trial and for no other purpose. Lankford then testified about a conversation he had with a newspaper reporter from the Lewiston Tribune. He told the reporter that he alone killed the Bravences. He testified at the hearing on his brother's motion for a new trial that this was a lie and that he had told the reporter he committed the murders because his brother told him to do it.

In sentencing Lankford to death the trial court considered both his testimony at his brother's trial and his testimony at the hearing on his brother's motion for a new trial. Under the title "Reasons Why Death Penalty Was Imposed" in the trial court's findings considering the death penalty, the trial court referred to this testimony and concluded by stating:

> Suffice it to say that the defendant has failed to take any responsibility whatsoever for his actions. This court specifically finds that the defendant has no capacity for rehabilitation.

Fifteen lines later the trial court imposed the death penalty.

LANKFORD'S FIFTH AMENDMENT RIGHTS WERE VIOLATED.

It is clear that Lankford would not have testified at his brother's trial, or at the hearing on his brother's motion for a new hearing, unless his testimony had been immunized. The use of his testimony by the trial court in sentencing was a violation of his rights under the fifth amendment. Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

In Kastigar the Supreme Court said:

> Immunity from the use of compelled testimony ... prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

Id. at 453, 92 S.Ct. at 1661.

In my view, this prohibition was violated when the trial court used Lankford's testimony in fashioning his sentence.

THE VIOLATION WAS NOT HARMLESS ERROR.

In its original opinion in this case (State v. Lankford, 113 Idaho 688, 747 P.2d 710 (1987)) this Court quoted the portion of the findings of the trial court concerning Lankford's testimony at his brother's trial and at the hearing on his brother's motion for new trial and stated:

> Although it is true that the district court judge pointed out the conflicting testimony given by Lankford at various times, including the testimony given pursuant to the immunity agreement, there has been no showing that the sentence was based upon the comments quoted above.

Id. at 696, 747 P.2d at 718, n.7.

In my opinion, it is this comment that caused the United States Supreme Court to vacate the judgment and to remand this case to us for further consideration in light of Satterwhite v. Texas.

In Satterwhite the Supreme Court held:

> It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer.
>
> ....
>
> The question ... is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).)

486 U.S. at ___, 108 S.Ct. at 1798, 100 L.Ed.2d at 290.

I am unable to say, beyond a reasonable doubt, that Lankford would have been sentenced to death, if his immunized testimony had not been used.

I would reverse and remand for resentencing and direct the trial court not to consider the immunized statements of Lankford.

BISTLINE, J., concurs.

APPENDIX C

Idaho Code Sections

I.C. 18-4001. Murder defined. Murder is the unlawful killing of a human being with malice aforethought or the intentional application of torture to a human being, which results in the death of a human being. Torture is the intentional infliction of extreme and prolonged pain with the intent to cause suffering. It shall also be torture to inflict on a human being extreme and prolonged acts of frugality irrespective of proof of intent to cause suffering. It shall also be torture to inflict on a human being extreme and prolonged acts of frugality irrespective of proof of intent to cause suffering. The death of a human being caused by such torture is murder irrespective of proof of specific intent to kill; torture causing death shall be deemed the equivalent of intent to kill.

I.C. 18-4002. Express and implied malice. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take aware the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

I.C. 18-4003. Degrees of murder. (Excerpt)
to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem is murder of the first degree.

I.C. 19-2515. Inquiry into mitigating or aggravating circumstances -- sentence in capital cases -- statutory aggravating circumstances -- judicial findings. (Excerpt)

(c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

(d) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the statute and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

(e) Upon the conclusion of the evidence and arguments in mitigation and aggravation the court shall make written findings setting forth any statutory aggravating circumstance found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detail in writing its reasons for so finding.

(f) Upon making the prescribed findings, the court shall impose sentence within the limits fixed by law.

(g) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed.

(1) The defendant was previously convicted of another murder.

(2) At the time the murder was committed the defendant also

committed another murder.

(3) The defendant knowingly created a great risk of death to many persons.

(4) The murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration.

(5) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(6) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

(7) The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e), or (f), and it was accompanied with the specific intent to cause the death of a human being.

(8) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

(9) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise of official duty.

(10) The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding.

I.C. 19-2516. Inquiry into circumstances - Examination of witnesses. The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or inform as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direction. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section.

APPENDIX C-2

APPENDIX D

May 1, [illegible]

[illegible]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

STATE OF IDAHO, Plaintiff,	)	Case #20157
vs.	)	
BRYAN STUART LANKFORD, Defendant.	)	ORDER RE: SENTENCING HEARING

WHEREAS, a trial in the above matter was had resulting in a verdict being returned by the jury on March 31, 1984, finding the above named defendant guilty of the crime of Murder in the First Degree, two counts, an offense for which the death penalty is authorized; and,

WHEREAS, pursuant to the provisions of Rule 33.1, Idaho Criminal Rules, an Order was entered requiring that a Pre-Sentence Investigation be conducted by the Idaho Department of Probation and Parole and that a report thereof be filed with the Court; and,

WHEREAS, an Order was entered requiring that the Defendant be examined by Dr. Michael Estes, a Psychiatrist, and that a psychological report upon the condition of the defendant be filed with the Court,

IT IS HEREBY ORDERED AS FOLLOWS:

(1) Sentencing is set for June 28, 1984 at 2 p.m.;

(2) That the Pre-sentence Investigation Report required by rule 33.1 I.C.R. be filed with the Court on or before June 14, 1984;

(3) That the Psychological Evaluation be filed with the Court on or before June 14, 1984;

(4) That on or before June 18, 1984 counsel for the State and Defense shall file with the Court a statement as to whether or not they have received the two above mentioned reports;

(5) That on or before June 18, 1984 the State shall notify the Court and the Defendant in writing as to whether or not the State will be seeking and recommending that the death penalty be imposed herein. Such notification shall be filed in the same manner as if it were a formal pleading;

(6) That in the event the State shall seek and recommend to the Court that the death penalty be imposed herein the following shall be filed with the Court on or before June 18, 1984:

(a) The State shall formally file with the Court and serve upon counsel for the Defendant a statement listing the aggravating circumstances enumerated in Idaho Code §19-2515(f) that it intends to rely upon and prove at the sentencing hearing to justify the imposition of the death penalty;

(b) The Defendant shall specify in a concise manner all mitigating factors which he intends to rely upon at the time of the sentencing hearing.

Dated this 17th day of May, 1984.

GEORGE REINHARDT
District Judge

Sep 1[illegible] DOCKETED

BY [illegible]

DENNIS L. ALBERS
HENRY R. BOOMER
Idaho County Prosecuting Attorney
P. O Box 314
Grangeville, Idaho 83530
(208) 983-2310

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff,	)	Case No. 20157
	)	
vs.	)	RESPONSE TO ORDER CONCERNING SENTENCING
	)	
BRYAN STUART LANKFORD,	)	
	)	
Defendant.	)	

COMES NOW, Dennis L. Albers, in relation to the Court's Order of September 6, 1984, and makes the following response.

In relation to the above named defendant, Bryan Stuart Lankford, the State through the Prosecuting Attorney will not be recommending the death penalty as to either count of first degree murder for which the defendant was earlier convicted.

DATED this 13 day of September, 1984.

DENNIS L. ALBERS

Certificate of Mailing

I, Dennis L. Albers, do hereby certify that a copy of the foregoing Response to Order Concerning Sentencing was mailed by me by regular first class mail deposited in the U. S. Post Office at Grangeville, Idaho, this 13 day of September, 1984, to:

W. W. Longeteig
Attorney at Law
P. O. Box 155
Craigmont, Idaho 83523

DENNIS L. ALBERS

APPENDIX E

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

STATE OF IDAHO, Plaintiff,	)	Case #20157
vs.	)	FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER SECTION 19-2515, IDAHO CODE.
BRYAN STUART LANKFORD, Defendant.	)	

The above defendant having been found guilty by a jury of the criminal offense of Murder in the First Degree - Two Counts (I.C. §18-4003(d)) which under the law authorizes the imposition of the death penalty; and the court having ordered a presentence investigation of the defendant and thereafter held a sentencing hearing for the purpose of hearing all relevant evidence and argument of counsel in aggravation and mitigation of the offense;

NOW, THEREFORE the Court hereby makes the following findings:

1. Conviction. That the defendant while represented by court appointed counsel was found guilty of the offense of Murder in the First Degree - Two Counts (I.C. §18-4003(d)) by jury verdict.

2. Presentence Report. That a presentence report was prepared by order of the court and a copy delivered to the defendant or his counsel at least seven (7) days prior to the sentencing hearing pursuant to section 19-2515, Idaho Code, and the Idaho

Criminal Rules.

3. Sentencing Hearing. That a sentencing hearing was held on October 12, 1984, pursuant to notice to counsel for the defendant; and that at said hearing, in the presence of the defendant, the court heard relevant evidence in aggravation and mitigation of the offense and arguments of counsel.

4. Facts and Argument Found in Mitigation.

(a) Because of the Defendant's age (24) there is a possibility that he could be rehabilitated.

(b) The Defendant smoked marijuana shortly prior to the murders of Mr. and Mrs. Bravence.

(c) The Defendant had a deprived childhood and was abused by his father.

(d) When the defendant is in the company of his brother, Mark Lankford, Mark Lankford is the more dominant of the two.

(e) The defendant is relatively intelligent and has a good command of the English language.

(f) The defendant has the capacity to be employed and is capable of being trained for employment.

5. Facts and Argument Found in Aggravation.

(a) The defendant is a dangerous and violent individual.

(b) The defendant has a personality disorder with anti-social features predominant.

(c) The defendant is deceitful and calculatingly manipulative.

(d) The defendant has never held a steady job and associates with undesirable individuals.

(e) The defendant has no significant ties to any community or to any individual.

(f) The defendant's past pattern of living clearly indicates that he will continue a life of criminal activity.

(g) The defendant has a past criminal record, including being adjudged guilty of the offense of Robbery in 1980. The

Defendant was placed on probation for 10 years for the Robbery offense. The defendant threatened the life of a Safeway clerk with a gun or an object intended to appear like a gun.

(h) The murders of Mr. and Mrs. Bravence were cold blooded and pitiless. The killing was not a product of psychotic behavior but was thought out and schemed.

(i) The defendant has previously failed to comply with a probation which he received for the robbery of the Safeway store.

(j) After the jury verdict of guilty in these cases and while awaiting sentencing, the defendant became involved in an altercation with, and threatened the life of a fellow inmate in the Idaho County Jail.

6. Statutory Aggravating Circumstances Found Under Section 19-2515(f), Idaho Code. This court finds beyond any reasonable doubt that the following five statutory aggravating circumstances exist:

(a) At the time the murder was committed the defendant also committed another murder - that is at the time Robert Bravence was murdered by the defendant, he also murdered Cheryl Bravence.

(b) The murders of the Bravences were especially heinous, atrocious or cruel, and manifested exceptional depravity. ~~As stated earlier~~ The victims did nothing to provoke the defendant who caused their skulls to be viciously and repeatedly beaten until smashed. The beating of Mr. and Mrs. Bravence was accomplished in such a way as to be characterized as extremely wicked and shockingly vile. The depravity exhibited by the defendant, in killing Mr. and Mrs. Bravence demonstrated a depravity which obviously offends all standards of morality and intelligence.

(c) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life. The defendant participated in the murder of the Bravences for nothing more than the hopes of obtaining a van and a few credit cards. The theft could easily have been accomplished without having resorted to murder. The murders were cold blooded and pitiless in that the defendant, in a cool, calm, and calculated

manner decided, with no provocation whatsoever, to take the lives of this young couple.

(d) The murders were defined as murder of the first degree by Idaho Code Section 18-4003(d) and the murders were accompanied with the specific intent to cause the deaths of Mr. and Mrs. Bravence. After causing the skulls of the Bravences to be smashed in, the defendant and his brother carried the unconscious bodies (dead or near death) into a remote area where they were left dead or to die.

(e) The defendant, by prior conduct and by conduct in the commission of the murders at hand has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

7. Reasons Why Death Penalty Was Imposed.

(a) This court finds that the mitigating circumstances which were presented do not outweigh the gravity of the Statutory Aggravating Circumstances listed above as would make the imposition of the death penalty unjust.

(b) The mitigating circumstances which were presented do not outweigh any one of the Statutory Aggravating Circumstances listed above as would make the imposition of the death penalty unjust.

(c) The jury in this case found the defendant to be guilty of two counts of murder of the first degree. The evidence clearly demonstrates and this court finds that the murders were intentionally committed by Mark and Bryan Lankford, each of whom, with the assistance of the other, caused the skulls of a young couple, Mr. and Mrs. Bravence, who were camping on the South Fork of the Clearwater River, in Idaho County, Idaho, to be smashed.

Furthermore, that following said assault Bryan and Mark Lankford loaded Mr. and Mrs. Bravence into the Bravence's camping van and drove them a short distance into the mountains

for disposal. The Lankfords carried the non-conscious Bravences into the woods and covered their bodies with brush not knowing whether or not they were dead but knowing full well that if they were not dead that death was inevitable as a result of the condition of their skulls and the fact that they were left unattended in a remote area.

Furthermore, this court finds that the murders were unprovoked. The Lankfords jointly, with malice aforethought, determined to kill the Bravences for money and for the camping van of the Bravences which carried Texas license plates and Texas registration. Said Texas identification would coincide with personal identification of the Lankfords who resided in Texas. This court further finds that the murders were committed with an abandoned and malignant heart. The lankfords possessed a shotgun which was held on Mr. Bravence by Bryan Lankford. Mark and Bryan Lankford then caused the skull of Mr. Bravence to be smashed who offered no resistence whatsoever and who did nothing to provoke the assault. Some time later Mrs. Bravence came to the site where her young husband was lying unconscious. Mrs. Bravence offered no resistence but went to her husband's side. Then the skull of Mrs. Bravence was caused to be smashed by the Lankfords. This court does not know how many times the head of Mr. Bravence or Mrs. Bravence was struck or with what their heads were struck. However, the blows were multiple in terms of number and tremendous in terms of force. This court does not know how many blows were struck by Bryan Lankford or how many blows were struck by Mark Lankford. The evidence clearly demonstrates and this court finds that both Bryan Lankford and Mark Lankford committed acts of force and violence directly upon the persons of Mr. and Mrs. Bravence which acts directly and proximately caused the deaths of Mr. and Mrs. Bravence. The facts show that either Bryan Lankford or Mark Lankford could have prevented the deaths of Mr. and/or

Mrs. Bravence.

The facts clearly show that after the bodies of Mr. and Mrs. Bravence were covered with brush and the Lankfords had successfully escaped the scene of the beatings - that both Bryan Lankford and Mark Lankford were in a position, without fear of harm from the other, to take steps to notify authorities anonymously or otherwise, of the location of Mr. and Mrs. Bravence on the chance that they may still have been alive. Neither of the Lankfords chose to do so however and instead they partied on the credit cards of the Bravences. They wined and dined themselves and stayed in expensive motels feeling secure and obviously content with their situation. This clearly shows a lack of remorse on the part of Mark and Bryan Lankford which has persisted to date.

The objectives of sentencing are:

(a) Protection of society.

(b) Deterrence (General and Special or Individual).

(c) Rehabilitation.

(d) Punishment or Retribution for wrongdoing.

With reference to the first objective, "Protection of Society", I find specifically that Bryan Lankford is a dangerous individual, that he is a violent individual, that he has a personality disorder with anti-social features predominant. He is dishonest, he is the prince of deceit, he is calculatingly manipulative. Bryan Lankford has floated from job to job and has in the past associated with undesirable individuals. He has no significant ties to any community or any individuals and his pattern of living clearly indicates that he will continue a life of criminal activity. Bryan Lankford was adjudged guilty of Robbery in 1980 and was placed on probation for 10 years. Finally, after being convicted of two counts of 1st degree murder, and while awaiting sentencing, the Defendant became involved in an altercation with, and threatened the

life of, a fellow inmate in the Idaho County Jail.

With reference to the 2nd objective of sentencing, "Deterrence", it should be noted that the plan to kill the Bravences was not a product of passion or psychotic behavior but was thought out and schemed. This Court is thus convinced that the punishment to be imposed will function as a general deterrent to murder. Furthermore, the liklihood of similiar future conduct is so certain that removal from society is the only method which will successfully deter Bryan Lankford from engaging in similiar conduct.

The third objective of sentencing is "Rehabilitation". This is the notion that I can do something or order something such that Bryan Stuart Lankford will contribute to, as opposed to detract from, the well being of society. It should be stressed that the defendant was considered for a rehabilitation plan when placed on probation for Robbery. The plan obviously failed. Had Bryan Lankford been placed in prison for Robbery of the Safeway store the Bravences would be alive today. We cannot however fault the Texas judicial system for giving Bryan Lankford a chance to better himself and for giving him an opportunity to prove that he could be a productive citizen. At the time he was placed on probation he had a minor criminal record. He blamed all his troubles on his father's cruel treatment towards him and the bad influence that his brother had on him. Furthermore, his family supported him. Perhaps the reason that our judicial system is credible and viable is because a first time offender who threatens the life of an innocent Safeway clerk can be placed on probation and given a chance. By the same token however, our judicial system will loose credibility and viability if we continue to permit the corrupt to terrorize the innocent

in our society.

The defendant has shown no remorse for his offenses. He has not cooperated with authorities after his arrest. He has told authorities that he and his brother had nothing whatsoever to do with the death of the Bravences. He has testified that his brother was alone involved in the murders. He has testified (On October 10, 1984 in the companion case, State vs. Mark Lankford, Idaho County Case #20158) that he called the Lewiston Tribune and claimed that it was he alone who murdered the Bravences this he later denied and offered the explanation which is set forth in the addendum to the presentence investigation report under date of October 3, 1984 to the effect that it was simply part of a plan that would secure freedom for his brother who could in turn free him.

Suffice it to say that the defendant has failed to take any responsibility whatsoever for his actions. This court specifically finds that the defendant has no capacity for rehabilitation.

The final objective of sentencing is Punishment or Retribution for wrongdoing. This aspect of sentencing is, in essence, an expression of community disapproval for the acts in question. The sentence that I have determined to be appropriate in this case is the least sentence that would not unduly deprecate the seriousness of the crimes in question.

As stated in State v. Miller, 105 Idaho 838, 841, "An intentional killing takes from the victim what an offender never can restore - the fragile gift of life. It is the final betrayal of another human being and the ultimate affront to civility. Our courts have no deeper obligation than to express society's condemnation of this act."

It is the opinion of this Court after much considered thought and soul-searching that the only way to protect society is to order, and this court does order that the defendant be sentenced to suffer the punishment of death for the murder of Captain Robert Bravence and his wife, Mrs. Cheryl Bravence.

CONCLUSION

That the death penalty should be imposed for the capital offenses of which he was convicted.

Dated this 15th day of October, 1984.

GEORGE REINHARDT
District Judge

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

STATE OF IDAHO, Plaintiff, vs. BRYAN STUART LANKFORD, Defendant.	Case #20157 JUDGMENT AND SENTENCE

The above entitled matter came on to be heard before the Honorable George Reinhardt, one of the Judges of the above entitled Court, on Monday, October 15, 1984. The Plaintiff, State of Idaho, was represented by Dennis L. Albers, Prosecuting Attorney for Idaho County, Idaho; the Defendant was personally present in court and was represented by Joan Fisher, Attorney at Law.

WHEREUPON, the presentence report previously ordered having been filed herein, and the Court having ascertained that the Defendant had had an opportunity to read said report, and all parts thereof, and the Defendant having been given an opportunity to explain, correct, or deny parts thereof, and the Court having heard the same as well as having heard testimony and argument in mitigation and aggravation pursuant to Idaho Code Section 19-2515, and the Defendant at such hearing having advised the Court that he had no legal cause to show why judgment and sentence should

not be pronounced against him, and the Court thereafter having entered Findings of the Court in Considering Death Penalty Under Section 19-2515, Idaho Code, the Court did then pronounce its Judgment and Sentence in accordance with said Findings and as follows:

With respect to the charges stated in the Information on file herein, and pursuant to the verdicts of the jury rendered herein which by reference are incorporated herein,

IT IS HEREBY ORDERED, AND IT IS THE JUDGMENT OF THIS COURT THAT YOU, BRYAN STUART LANKFORD, ARE GUILTY OF TWO COUNTS OF THE CRIME OF MURDER IN THE FIRST DEGREE as charged in said Information and as found by the unanimous verdict of the jury; and,

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that you be, and you hereby are, sentenced to suffer death in accordance with the provisions of Idaho Code Section 18-4004 and in the manner prescribed by Chapter 27 of Title 19, Idaho Code, at the Idaho State Penitentiary, Boise, Ada County, Idaho.

IT IS HEREBY FURTHER ORDERED that you be, and hereby are, remanded to the custody of the Idaho County Sheriff, there to be held until such time as demand is made for delivery to the duly authorized guard of the Idaho State Department of Corrections and for transportation by said guard to the said Idaho State Penitentiary.

ENTERED at Grangeville, Idaho County, State of Idaho, this 16th day of October, 1984.

GEORGE REINHARDT
District Judge

ORIGINAL

NO. 88-7247

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BRYAN STUART LANKFORD,

Petitioner,

vs.

THE STATE OF IDAHO,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

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AUTHORITIES CITED

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THE STATE OF IDAHO,

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF IDAHO

STATEMENT OF THE CASE

The petitioner, Bryan Stuart Lankford, was sentenced to death for the murders of Robert Bravence and Robert's wife, Cheryl.

In June of 1983, Bryan Lankford was on probation in Texas after having been convicted of a Houston robbery. (Trial Tr., Vol.IV, p.672.)

One of the conditions of probation was that Bryan not associate with his older brother, Mark Lankford. (Trial Tr., Vol.IV, p.678.) Nonetheless, Lankford had violated this condition of probation, together with several others. (Trial Tr., Vol.IV. pp.679-681.) Lankford believed that these probation violations would probably result in his imprisonment (Trial Tr., Vol.IV, p.682), and he decided to go to Mexico, Id., but when he contacted his brother Mark, Mark suggested that he and Bryan leave Texas together. (Trial Tr., Vol.IV, p.684.)

The Lankfords made their way to Idaho County, Idaho, where they camped in the forest for a few days and then decided to

abandon Mark's car, thinking that the police seeking Bryan, and the General Motors Acceptance Corporation, which had not been paid for the car, might be looking for it. (Trial Tr., Vol.IV, pp.690-691.) The car was driven into the woods and camouflaged with tree branches. (Trial Tr., Vol.IV, p.260, ls. 18-22; Vol. II, P.302, ls.10-12; Vol.IV, pp.636-637.)

After hiding Mark's car, the Lankford brothers set off on foot down a mountain road.

Robert Bravence, an officer of the United States Marine Corps (Trial Tr., Vol.II, pp.282), et seq.), and his wife, Cheryl, were vacationing in the area. The Bravences had called Bravence's mother, Gilda L. Howard, from Grangeville on June 21, 1983. (Trial Tr., Vol.III, p.435.)

Catching sight of the Bravences, the Lankford brothers decided to steal their car and spent some time discussing the prospect. See: Trial Tr., Vol.V, pp.767, 769; Vol.III, p.529, ls.6-9.

In a statement made to an FBI agent, Bryan stated that after an hour of discussion, he and Mark decided to steal the Bravences' van. They then walked into the camp where the VW van was parked. Bryan was carrying a shotgun which he held on Robert Bravence while Mark ordered Bravence to kneel down on the ground. (Tr., Vol.III, p.529, ls.13-15.) "Mark then hit the man over the head with a nightstick like a policeman uses. . . The woman came up from a nearby creek about that time, and Mark told her to get on the ground. She said something about her husband being hurt on the ground; and, then, she got on the ground. Mark then hit the woman over the head with the same nightstick that he had hit the man on the head with." (Trial Tr., Vol.III, p.529, ls. 15-23.) The appellant also stated to Randy Baldwin, an Idaho County Deputy Sheriff, that Mark had struck the male victim on the head while he, Bryan, held a shotgun on the victim, and when the female victim came up from the river Mark told her to get down on the ground and struck her on the head also. (Trial Tr., Vol.IV, pp.650-651.)

The Lankfords left Idaho in the Bravences' van. They drove the van into Oregon, where they stayed overnight at a Holiday Inn in Wilsonville, near Portland. They purchased accommodations and food with the Bravences' credit card. Bryan forged Bravence's name to the credit card receipts, using his own driver's license for identification. (Trial Tr., Vol.III, p.530.) He also used the Bravences' travelers checks, which had been found in the glove compartment of their van. Id.

Appellant's fingerprints were found on charge slips associated with the use of the Bravences' credit card. See Trial Tr., Vol.III, pp.536, 540, 541, 567-68, 589; Exhibits 78-79.

From June 22 through July 7, after the Bravences were dead, in excess of $3,000 was charged to their credit card. (Trial Tr., Vol.III, p.448.)

Appellant and his brother drove the Bravences' van to Los Angeles, California, where they abandoned it on a public street in early July of 1983. (Trial Tr., Vol.II, p.531, l.25; Vol.II, p.274.)

The Lankfords were apprehended in the state of Texas and returned to Idaho for trial. The two brothers were tried separately. Bryan Lankford was convicted and sentenced to death, as was Mark.

Lankford's conviction and sentence were reviewed by the Supreme Court of Idaho. That court considered and rejected the claim that Lankford had insufficient notice of the possibility that the penalty of death might be imposed, that the court had

improperly relied on testimony compelled under a grant of immunity, and that the court at sentencing was not entitled to rely on any evidence other than that produced through the testimony of witnesses present in court. On Lankford's first petition for writ of certiorari, this Court remanded the cause to the Supreme Court of Idaho for reconsideration in light of Satterwhite v. Texas, 486 U.S. ___ (1988). The Idaho Supreme Court upheld Lankford's conviction and sentence on grounds not challenged here. State v. Lankford, 747 P.2d 710 (Idaho 1987).

SUMMARY OF ARGUMENT

1. The questions presented by Lankford's petition for certiorari are beyond the scope of this Court's order remanding the cause to the Supreme Court of Idaho for reconsideration in light of Satterwhite v. Texas, 486 U.S. ___ 1988. Lankford now raises two issues not previously considered by the Supreme Court of Idaho and two issues that were incorporated in his prior petition for certiorari but which were not encompassed by this Court's order of remand.

2. Lankford's claim that the decision of the Supreme Court of Idaho rejecting the rationale of Adamson v. Ricketts, 865 F.2d 1011 (9th. Cir. 1988), creates a conflict which should be resolved by this Court, has been answered by this Court's decision in Hildwin v. Florida, No. 88-6066, May 30, 1989, which holds that there is no requirement in the Constitution that capital sentences be imposed by a jury.

3. Although the trial judge imposed the death penalty notwithstanding a contrary recommendation by the prosecuting attorney, the Idaho homicide statutes gave Lankford constitutionally adequate notice of the potential penalty for first-degree murder. His argument to the contrary raises no important federal question not already decided.

4. This Court's precedent authorizes the use of a broad range of hearsay information in capital sentencing proceedings. Accordingly, petitioner's claim that the confrontation clause is violated by the consideration of hearsay evidence in the penalty phase of the capital case raises no important constitutional question.

5. A state may appropriately require the defendant to shoulder a burden of pursuading the sentencing authority that mitigating factors are sufficient to preclude the imposition of the death sentence. Petitioner's claim to the contrary raises no important federal question.

REASONS FOR DENYING THE WRIT

1. The Federal Questions Raised By Lankford's Petition For Certiorari Are Not Within The Scope Of This Court's Mandate To The Supreme Court Of The State Of Idaho.

This is petitioner's second application for a writ of certiorari. It exceeds the scope of the opinion below.

In his first petition, Lankford presented the following issues:

1) "Certiorari should be granted ... to review the state court's decision approving a death sentence imposed after defense counsel has presented no evidence or argument against imposition of the death penalty and reliance on written notice that the death penalty would not be sought by the state,"

2) "Whether partial reliance at sentencing by a judge on testimony compelled from a capital defendant under an express grant of immunity violates the Fifth and Fourteenth Amendments and whether use of the testimony can be considered harmless error,"

3) "Whether there is a conflict between the Idaho Supreme Court and the Federal Court relating to the right to

confrontation of witnesses at the penalty phase of a capital case," and

4) "Whether the State of Idaho's application of its 'heinous, atrocious, or cruel' aggravating circumstance comports with the Eighth Amendment principles of Godfrey v. Georgia, ... "

On June 13, 1988, this Court ordered that the judgment of the Supreme Court of Idaho be vacated and the case remanded "for further consideration in light of Satterwhite v. Texas, 486 U.S. ___, 1988."

On remand, petitioner argued to the Supreme Court of Idaho that Satterwhite v. Texas delineated Fifth and Sixth Amendment violations arising out of the circumstance that Lankford had been given immunity from future prosecutions for robbery and the fraudulent use of credit cards. He also asserted issues of state law previously decided on direct appeal. The Idaho Supreme Court found that the issue of a Sixth Amendment violation had been defaulted because it was not timely raised in the state courts, that there was no factual predicate for Lankford's Fifth Amendment claim and that, even if there had been, Lankford had waived the Fifth Amendment privilege by testifying on the subject matter of the claim at his trial. State v. Lankford, Nos. 15760/16170, April 4, 1989.

Lankford now seeks review of the decision of the Supreme Court of Idaho on remand. He does not, however, offer any issue considered by the Idaho Supreme Court in response to this Court's order in Lankford v. Idaho, 486 U.S. ___, 108 S.Ct. 2815 (1988). Instead, he raises two new issues not considered by the Idaho Supreme Court and two issues that were incorporated in his prior petition for certiorari but were not encompassed by this Court's order of remand in Lankford v. Idaho, supra.

With respect to issues not previously considered in the state courts, this Court has held that it will not address a federal question in cases where the highest court of the state has not decided the federal question or the question was not presented in such manner that it was necessarily decided by the action of the state court. Street v. New York, 394 U.S. 576 (1969). The Court has also followed the assumption that where a state court has failed to pass upon a federal question, the omission was due to want of proper presentation in the state's courts unless the aggrieved party can affirmatively show the contrary. Id; Bailey v. Anderson, 326 U.S. 203 (1945); Chicago I. & L. R. Company v. McGuire, 196 U.S. 128 (1905).

A litigant's failure to present a federal question in conformance with state procedure, for which failure a state court declines to consider the federal question, constitutes an adequate state ground, barring review in this Court. Michigan v. Tyler, 436 U.S. 499 (1978).

With respect to the issues previously presented to this court by Lankford's prior petition, this Court has already acted upon that petition and limited its response to a remand for reconsideration of the case in light of Satterwhite v. Texas. The only question that should now be before the Court is whether the state court fully followed this Court's mandate. On remand for reconsideration it is contemplated that the state court will decide whether the conviction or sentence may stand in light of the precedent that brought about the remand. See, Yates v. Aiken, 484 U.S. ___ (1988). The petitioner does not even argue that the Idaho Supreme Court failed to follow this Court's mandate.

Even if the issues presented were properly before this court, there is no basis for granting a writ of certiorari to consider them.

2. The Conflict Between The Supreme Court Of Idaho And The Ninth Circuit Court Of Appeals Over Whether The Sixth Amendment Guarantees A Defendant A Jury Determination Of Statutory Aggravating Factors Has Been Resolved By This Court; No Important Reason To Grant The Petition For Certiorari Remains.

In Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), en banc, the court of appeals held that the statutory aggravating circumstances, set out in an Arizona statute that was, for practical purposes, the same as the Idaho capital sentencing statute, were elements of an offense of "capital murder," for which reason it was necessary that the death penalty be imposed by a jury. Having concluded that the sentence enhancement factors of the Arizona statute were elements of an offense the court of appeals defined as "capital murder," the court went on to distinguish Spaziano v. Florida, 468 U.S. 447 (1984), on the ground that "it left untouched the question of the right to a jury trial where the aggravating circumstances of a state's death penalty statute are elements of a capital offense." 865 F.2d at 1029.

This Court has since established that the rationale used by the court of appeals in Adamson is invalid, Hildwin v. Florida, No. 88-6066, May 30, 1989. Accordingly, there is no reason to grant the writ to resolve this question.

3. Lankford's Assertion That A Protected Right Was Violated Because The Judge Imposed The Death Penalty Even Though The State Did Not Seek It, Raises No Important Constitutional Question Not Already Decided.

After Lankford had been convicted of first-degree murder, the district court directed that the prosecuting attorney give written notice of his intent to seek the death penalty. The prosecutor responded that he was not asking for the death penalty. See, State v. Lankford, slip op. at 14; Petitioner's Appendix A-14.

In the Idaho Supreme Court, Lankford argued that because the prosecutor had not recommended the death penalty he was entitled to formal notice by the trial court that it would consider the death penalty at sentencing.

Lankford's first claim in this Court is that he did not receive the quality of notice that the due process clause guaranteed to him. The law is to the contrary.

The defendant was not entitled to greater notice than given by the Idaho homicide statutes, which made clear that the court could impose the penalty of death. See Idaho Code § 19-2515(c)(d)(e). Clearly, the defendant was, or should have been, aware that the court and not the prosecuting attorney would impose sentence. Decisions by the Idaho appellate courts have been consistently clear that the sentencing judge is not bound by recommendations of the prosecuting attorney. See, State v. Torres, 736 P.2d 853 (Idaho App. 1987); Williams v. State, 747 P.2c 94 (Idaho App. 1987); State v. Lankford, 747 P.2d 710 (Idaho 1987).

In Dobbert v. Florida, 432 U.S. 282 (1977), the trial judge, in accordance with Florida statutory procedure, imposed the death penalty even though the jury had recommended a life prison term. This Court upheld the death penalty against an ex post facto argument, pointing out that "the statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the state ascribed to the act of murder." 432 U.S. at 297; cf.: Lockett v. Ohio, 438 U.S. 586 (1978) (state court's consistent construction of statute afforded notice sufficient to satisfy due process requirement).

Dobbert, which was relied upon by the Supreme Court of Idaho in rejecting Lankford's due process claim, and Lockett dispose of the issue.

In his petition for certiorari, Lankford adds a claim not made in the Idaho Supreme Court that the court's action in sentencing him to death against the prosecuting attorney's recommendation denied him effective assistance of counsel because his sentencing counsel was assertedly "misled" by what appears to be a self-constructed representation that it was not necessary to prepare against the possibility of a death penalty.

Lankford's argument that he was denied effective assistance of counsel because, as petitioner puts it, "the proceedings go beyond a lack of notice to an affirmative misleading of counsel," Petition, p.13, is both factually inaccurate and procedurally deficient.

Prior to the sentencing proceeding, Lankford moved to dismiss his counsel.

Initially, the trial judge appointed Lankford's present counsel, Joan Fisher, Esq., to work with his trial counsel. Thereafter, through his newly-appointed co-counsel, Lankford moved to dismiss his trial counsel from the case. Lankford was admonished that he would not be permitted to unduly delay sentencing by requests to change counsel. Given that admonition, Lankford persisted in his motion to dismiss trial counsel. The court asked trial counsel to remain available to give Lankford's new counsel any information concerning the case she might need.

The trial court made extensive inquiry into the information available to Ms. Fisher for sentencing purposes. The prosecuting attorney stated that all necessary information was available in the preliminary hearing transcript, which had been furnished Ms. Fisher. Trial counsel stated that the preliminary hearing evidence paralleled in every significant way the evidence offered at trial. Mr. Fisher stated that she had had a chance to review the preliminary hearing transcript. Arrangements were made to furnish her with the audio tapes of the trial proceedings to compare with the transcript of the preliminary hearing.

Lankford produced a number of witnesses in his behalf at the sentencing hearing. The witnesses called in mitigation sought to diminish Lankford's culpability for the crime, suggesting that he was dominated by his older brother, Mark Lankford.

Clearly, petitioner's counsel was not misled.

Moreover, this claim was not presented to the Idaho Supreme Court. The Court has held that it will not consider a federal question in cases where the highest court of the state has not decided the federal question, or the federal question was not presented in such a manner that it was necessarily decided by the action of the state court. Street v. New York, 394 U.S. 576 (1969). Where a state court has failed to pass upon a federal question, it will be assumed that the omission was due to the want of proper presentation in the state courts unless the aggrieved party can affirmatively show the contrary. Id. See also, Bailey v. Anderson, 326 U.S. 203 (1945); Chicago I., & L.R. Co., v. McGuire, 196 U.S. 128 (1905).

A litigant's failure to present a federal question in conformance with state procedure, for which failure a state court declines to consider the federal question, constitutes an adequate state ground, barring review in the United States Supreme Court. Michigan v. Tyler, 436 U.S. 499 (1978).

4. Petitioner's Claim That There Is A Conflict Among Lower Courts Respecting The Right To Confrontation At The Penalty Phase Of A Capital Case Raises No Important Federal Question Not Already Decided.

Idaho Code § 19-2515(d) provides:

> In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for all purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity torespond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

Many other states authorize the sentencing court to consider the trial record, presentence investigative reports, and other offender's record of prior convictions at sentencing, whether sentencing is conducted by a judge or jury. See, e.g., Ala. Code § 13A-5-45; Ariz. Rev. Stat. Annot. Code § 13-703; Colo. Rev. Stat. § 18-3-101; Conn., Gen. Stat. § 53a-46a(c); Del. Code Annot. § 4209c; Fla. Stat. § 921.141; Ill. Rev. Stat. Ch. 38, para. 9-1(e); Ky. Rev. Stat. § 532.025(1)(a);(b); Md. Annot. Code art. 27, § 413(c); Mont. Code Annot. § 46-18-302; Neb. Rev. Stat. § 29-2521; Nev. Rev. Stat. § 175.552; Or. Rev. Stat. § 163.150; Pa. Cons. Stat. 42 § 9711; Tenn. Code Annot. § 39-2-203(c); Tex. Penal Code Annot. art. 37.071; Utah Code Annot. § 76-3-207(2); Wash. Rev. Code Annot. § 10.95.060(3); Wyo. Stat. § 6-2-102(c).

Petitioner, relying on cases that generally distinguish capital proceedings from other criminal cases and that generally address the right of confrontation at trial, argues that the confrontation clause precludes any evidence at sentencing other than that obtained from witnesses attending in person and subject to cross-examination. The argument is contrary to a long line of cases decided in this Court.

It is clear that the sentencing court is authorized to consider a great many things which could not properly be admitted at the trial of guilt or innocence. That it shouldbe so is not at all illogical because the objects of the trial and of the sentencing proceeding are different. At trial, great care must be taken to exclude information about those aspects of the defendant's character and background which might influence the jury to believe he was guilty of the crime charged merely because he was a generally evil person. Williams v. New York, 337 U.S. 241- (1949). At sentencing, however, the same information about the defendant's character and background which must be excluded at trial must be considered if the court is to make a well-informed decision about what disposition to make of the offender. The sentencing court must be given access to the broadest range of information available about the defendant, Roberts v. United States, 445 U.S. 552 (1980), and the sentencing judge's inquiry is largely unlimited either as to the kind of information which may be considered, or its source, United States v. Grayson, 438 U.S. 41 (1978).

The purpose of the inquiry at sentencing is to make the punishment fit both the offender and the crime, and for that reason the information which may presented at sentencing is broader than that which is appropriately received at trial. Grayson, supra; Williams v. New York, supra.

The court held in Williams that the due process guarantee was not violated when the sentencing judge considered information from a presentence investigative report. Williams

was sentenced to death. In this Court he argued that he had been deprived of due process of law because the sentencing authority had considered information from sources other than witnesses testifying in person.

The defendant's protection in these circumstances lies in his right to respond to whatever information may be presented. Williams, supra. That right is specifically codified by Idaho Code § 19-2515(d).

The principles stated above have been applied in cases involving the confrontation clause. Cf.: Williams v. Oklahoma, 358 U.S. 576 (1959) ("State's attorney's statement of the details of the crime and of petitioner's criminal record -- all admitted by petitioner to be true -- did not deprive petitioner of fundamental fairness or of any right of confrontation or cross-examination").

5. No Important Federal Constitutional Question Is Raised By The Claim That There Is A Conflict Between The State Of Idaho And The Ninth Circuit Over Whether The Idaho Death Penalty Statute Creates An Unconstitutional Presumption Of Death Under The Eighth And Fourteenth Amendments.

Petitioner, relying on Adamson v. Ricketts, supra, contends that the Idaho death penalty statute creates a constitutionally impermissible "presumption of death" by the device of "placing the burden of proof of mitigating factors on the defendant." Petition for Certiorari, pp. 17-18.

The court of appeals' view is at odds with this Court's decisions upholding various death sentencing statutes constructed according to different models. See, Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Profitt v. Florida, 428 U.S. 242 (1976); Lowenfield v. Phelps, 484 U.S. ___, 108 Sup.Ct. 346 (1988). The Court has made it clear that the constitutional sufficiency of a capital sentencing scheme depends upon whether the statute "narrows the class of death eligible murders and then at sentencing allows for consideration of mitigating circumstances and the exercise of discretion." Lowenfield v. Phelps, 484 U.S. at 108. A state is entitled to assign the defendant a burden of persuasion or a burden of going forward with evidence:

> [The Supreme Court] should not lightly construe the constitution so as to intrude upon the administration of justice by individual states ... [I]t is normally within the power of the state to regulate procedures under which its laws are carried out, including the burden of production of evidence and the burden of persuasion. ... If the state ... chooses to recognize a factor that mitigates the degree of criminality or punishment ... , the state may assure itself that the fact has been established with reasonable certainty. Patterson v. New York, 432 U.S. 197, 201,209 (1977).

The sentencing authority's discretion must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," Gregg v. Georgia, 428 U.S. 153, 189 (1976), while allowing the sentencing authority to give "particularized consideration to relevant aspects of the character and record of each defendant before imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976). Neither goal is defeated by requiring the defendant to prove the facts underlying a factor in mitigation to the satisfaction of the sentencing authority.

No significant and undecided federal question is proferred by this claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED this 5 day of July, 1989

Respectfully submitted,

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Attorney for Respondent

No. 88-7247

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

BRYAN STUART LANKFORD,,

Petitioner,

v.

THE STATE OF IDAHO,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF IDAHO

CERTIFICATE OF MAILING

I, LYNN E. THOMAS, counsel of record for respondent, State of Idaho, do state under oath, pursuant to Rule 28.2, that the original of the accompanying respondent's RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO was placed in the United States mail on July 5, 1989, first class postage affixed, at Boise, Idaho, addressed to:

Joseph F. Spaniol, Jr.
Clerk of the Court
United States Supreme Court
One First Street, N.E., Room 17
Washington, DC 20543

Lynn E. Thomas
LYNN E. THOMAS

CERTIFICATE OF MAILING

ORIGINAL

DISTRIBUTED
AUG 22 1989

No. 88-7247

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

BRYAN STUART LANKFORD,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

PETITIONER'S REPLY BRIEF UNDER RULE 22.5

This reply brief addresses arguments first raised in Respondent's "Response to the Petition for Writ of Certiorari to the Supreme Court of Idaho" (hereafter, "BIO").

1. Procedural matters. Respondent advances two procedural objections to this Court's consideration of the issues presented in the Petition for Certiorari. Both are groundless.

a. Acting on petitioner Lankford's first certiorari petition, this Court granted the writ, vacated the judgment of the Idaho Supreme Court affirming Lankford's death sentence, and remanded for reconsideration in light of Satterwhite v. Texas. Lankford v. Idaho, 108 S. Ct. 2815 (1988). On remand, the Idaho Supreme Court again affirmed the death sentence. Respondent argues that "[w]ith respect to the issues previously presented to this court (sic) by Lankford's prior petition, this Court has already acted on that petition and limited its response to a remand for reconsideration...in light of Satterwhite"; thus, the only issue open to petitioner on a second certiorari petition is the Satterwhite issue. BIO, page 7.

This misconceives the nature of a grant/vacate/remand disposition and ignores the Court's settled practices. Even if the Court had denied Lankford's first certiorari petition, that

denial would not have constituted a ruling on the merits of the issues presented, and would not have foreclosed their consideration on the merits in any subsequent proceeding. Brown v. Allen, 344 U.S. 443, 489-497 (1953) (opinion of Justice Frankfurter, expressing the position of the majority on this point, see 344 U.S. at 451-452); see e.g., Turner v. Murray, 476 U.S. 28 (1986) (granting relief on an issue on which certiorari had previously been denied); Maynard v. Cartwright, 108 S. Ct. 1853 (1988) (same); see also Darden v. Wainwright, 477 U.S. 168 (1986). And if the Court had granted certiorari, heard argument, and then concluded that the Satterwhite issue required a remand, it would certainly have heeded the familiar "policy of strict necessity in disposing of constitutional issues" (Rescue Army v. Municipal Court, 331 U.S. 549, 568 (1947)) and would have reserved judgment on all other issues in the case. See e.g., Lockett v. Ohio, 438 U.S. 586, 609 n.16 (1978); Hitchcock v. Dugger, 107 S. Ct. 1821, 1822 n.1 (1987). A fortiori, the Court's action in granting Lankford's first certiorari petition, vacating the judgment below, and remanding on a single ground does not estop the Court after remand from considering issues presented but not decided in the earlier certiorari proceeding. To do so is fully within the Court's power and consistent with its prior practice. Burger v. Kemp, 107 S.Ct. 3114, 3119 (1987). See Burger v. Zant, 467 U.S. 1212 (1984) and Burger v. Kemp, 474 U.S. 806 (1985); see also Rogers v. Richmond, 365 U.S. 534 (1961).

b. Respondent contends that Questions I and IV in the present certiorari petition raise "issues not previously considered by the Supreme Court of Idaho" (BIO, page 4). In fact, Question I was explicitly decided by the Idaho Supreme Court in its original opinion affirming Lankford's death sentence: that opinion rejected Lankford's "attack[ ] [on] the constitutionality of Idaho's capital punishment procedure...because the statute does not require jury participation in the sentencing procedure," saying: "The issue of jury participation has been resolved in Idaho in State v. Creech,...and approved under the United States

Constitution in McMillan...v. Pennsylvania, 477 U.S. 79...(1986)." 113 Idaho at 697, Appendix A to the Petition for Certiorari, page A-5. (The issue was raised again in the Idaho Supreme Court on remand, as described in the Petition for Certiorari, page 9). Question IV was first presented to the Idaho Supreme Court on remand (see id., page 10); it was not explicitly addressed in that court's opinion; and the only reference in the opinion to a refusal to consider any issues on the merits relates to "other issues of state law previously raised on direct appeal," Appendix B to the Petition for Certiorari, page B-8 (emphasis added). Thus the rule of Michigan v. Long, 463 U.S. 1032 (1983), and Harris v. Reed, 109 S.Ct. 1038 (1989), is applicable; and Question IV is properly presented for review. See also Smith v. Digman, 434 U.S. 332 (1978) (per curiam).

2. The first question presented: the Sixth Amendment right to jury trial. Respondent argues that Hildwin v. Florida, 109 S.Ct. 2055 (1989) (per curiam), resolves the conflict between the Idaho Supreme Court's decision here and the Ninth Circuit's decision in Adamson v. Ricketts, 865 F. 2d 1011 (9th Cir. 1988)(en banc). But Hildwin dealt with the particular Florida statutory scheme upheld in Spaziano v. Florida, 468 U.S. 447 (1984), under which a jury renders an advisory verdict of life or death, and the judge is free to override the jury's life verdict only if the case for death is so strong that virtually no reasonable person could disagree. See id., at 465 ("[t]his Court has already recognized the significant safeguard the Tedder standard affords a capital defendant in Florida," citing Dobbert v. Florida, 432 U.S. 282, 294-295 (1977), and Proffitt v. Florida, 428 U.S. 242, 249 (1976)). The per curiam opinion in Hildwin explicitly found the issue before it controlled by Spaziano, stating the issue and its holding with precision: "If the Sixth Amendment permits a judge to impose a sentence of death when a jury recommends life imprisonment,...it follows that it does not forbid the judge from making the written findings that authorize imposition of a death

sentence when the jury unanimously recommends a death sentence [as Hildwin's jury did]." 109 S. Ct. at 2056.

Idaho's procedure differs altogether from Florida's. In Idaho, the jury plays no role at all in capital sentencing. The factual finding of a statutory aggravating circumstance which renders the defendant eligible for a death sentence is made solely by the court. See Idaho Code §19-2515(c), (g), Appendix C to the Petition for Certiorari, page C-1. Thereafter, the court may consider nonstatutory aggravating circumstances as well as statutory aggravating circumstances and mitigating circumstances in a weighing process that produces the sentence of life or death. Idaho Code §19-2515 (c), (d), (e). Petitioner Lankford does not contend that either the findings of nonstatutory aggravating circumstances or the ultimate sentencing judgment must be made by a jury, but that the Sixth Amendment requires a jury finding of the factual existence of the one or more statutory aggravating circumstances that spell the difference between non-capital and capital murder. If the Sixth Amendment does not guarantee a jury trial on such facts--issues of actus reus and mens rea that state law requires to be proved beyond a reasonable doubt to make a defendant eligible for a qualitatively more severe sentence--it is hard to conceive of any factual issue which the Constitution would reserve for juries in criminal trials.

If Hildwin forecloses this claim, then Hildwin has extended Spaziano so as to eviscerate fundamental and long-settled Sixth Amendment principles not discussed in either opinion (see Petition for Certiorari, page 12, n.4). The Court has not previously undertaken to decide issues of this magnitude without briefing or argument.

3. The second question presented: the denial of fair notice and opportunity to prepare for a capital sentencing hearing. Respondent treats this question as resolved by Dobbert v. Florida, 432 U.S. 282 (1977). BIO, pages 9-10. Of course, it is not. Dobbert might control the question whether aggravating

circumstances need to be specifically pleaded in a capital prosecution, but that is not the question presented by the Petition for Certiorari or the facts of Lankford's case. The question here is whether, when a prosecuting attorney serves written notice on a criminal defendant that the death penalty will not be sought, a trial court may impose a sentence of death without first informing the defendant that the appropriateness of such a sentence is an issue to be tried and giving the defendant a fair opportunity to prepare to try it. Neither Dobbert nor any other decision of this Court sanctions this "indefensible sort of entrapment by the State," Raley v. Ohio, 360 U.S. 423, 438 (1959).

Respondent argues that Petitioner's counsel was not misled by the written notice that the prosecution was not seeking the death penalty, contending that the defense was adequately informed of the facts by access to a preliminary hearing transcript. BIO, pages 10-11. First, the argument mischaracterizes the quantity and quality of information available to defense counsel before sentencing. The preliminary hearing transcript did not contain the testimony of sixteen witnesses who testified at trial, including the defendant. The audio tapes to which Respondent refers covered seven days of testimony, and were provided to new defense counsel on the morning of October 11, 1988, less than 24 hours before the sentencing hearing.

Moreover, Respondent misses the critical issue. The question here is not what information defense counsel had available to her, but in what manner she was led to believe that information was to be examined and used. Because the prosecution had responded to an order of the trial court by giving formal notice that it did not intend to seek the death penalty, defense counsel's review and use of the information available to her, in the short time she had, was never focused on the death sentencing issues or evidence of statutory aggravating factors. All of counsel's tactical and strategic decisions in the preparation and conduct of the sentencing hearing - - whether to use the 24 hours available to her to prepare witnesses or to listen to the audio tapes of the

trial; the focus and content of the evidence to be produced by defense witnesses; which defense witnesses to call; whether to call the defendant; what argument to be made in light of the evidence produced - - were all shaped by the State's representation, and the trial court's apparent acquiescence, that the death penalty was not in issue. See Coleman v. McCormick, 874 F.2d 1280 (9th Cir. 1988) (en banc). Under these circumstances, the adequacy of the implicit statutory notice on which Respondent relies (BIO, page 10) is a serious constitutional question squarely presented.

Nor should the Court should be misled by Respondent's assertion that this issue was not presented to the Idaho Supreme Court. BIO, page 11. The issue and argument was fully presented to the Idaho Supreme Court. A copy of the extensive argument made in Petitioner's direct appeal on this point is attached as Appendix A.

4. The third question presented: the denial of the right to test information supporting a capital sentence by the basic adversary procedures of confrontation and cross-examination. Respondent treats this question as resolved by Williams v. New York, 337 U.S. 241 (1949). BIO, pages 13-14. This ignores the "constitutional developments which require us to scrutinize a State's capital-sentencing procedures more closely than was necessary in 1949." Gardner v. Florida, 430 U.S. 349, 357 (1977)(plurality opinion). Gardner does not control the specific issue presented here--whether a death sentence may be based on adversarially untested extra-record evidence--but neither does Williams after Gardner. The issue merits this Court's review.

5. The fourth question presented: the imposition on a capital defendant of the burden of persuading the sentencer that mitigating circumstances "make the imposition of the death penalty unjust." Respondent does not contest that the burden of persuasion imposed on capital defendants by the Idaho statute is inconsistent with the federal constitutional rulings in Adamson v. Ricketts, 865 F. 2d 1011 (9th Cir. 1988) (en banc), and Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). Certiorari should be granted to consider the merits of the issue which respondent does argue. BIO, pages 14-15.

Respectfully submitted,

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*COUNSEL OF RECORD

No. 88-7247

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

BRYAN STUART LANKFORD,

Petitioner,

v.

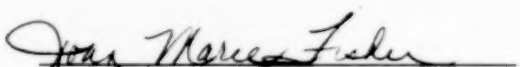
STATE OF IDAHO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF IDAHO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of August, 1989, served a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF UNDER RULE 22.5, by placing same in the United States mail, first class postage prepaid, addressed to Lynn E. Thomas, Solicitor General, State of Idaho, Boise, Idaho 83720.



JOAN M. FISHER
Counsel of Record

ORIGINAL

No. 88-7247

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

BRYAN STUART LANKFORD,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Idaho

PETITIONER'S SUPPLEMENTAL AUTHORITY

Since the filing of Petitioner's Brief and Reply Brief, additional case authority has emerged, which supports a grant of certiorari, particularly with respect to the third question presented: the constitutionality of relying on extra-record information in a capital sentencing proceeding.

The Eleventh Circuit has held that reliance on such information at sentencing, even in a noncapital case, violates the Constitution. United States v. Castellanos, 882 F.2d 474 (11th Cir. 1989). The Tenth Circuit has held to the contrary, in the context of noncapital sentencing proceedings, explicitly distinguishing capital sentencing in light of Gardner v. Florida, 430 U.S. 349 (1977). United States v. Beaulieu, 893 F.2d 1177, 1180 n.5 (10th Cir. 1990), cert. denied 58 U.S.L.W. 3834 (U.S., June 26, 1990). As Justice White pointed out in his opinion dissenting from the denial of certiorari in Beaulieu, this conflict among the Circuits and the highest state courts, regarding the existence and extent of a right to confrontation at the sentencing stage of capital cases, is a matter of sufficient importance and concern to warrant this Court's review.

For that reason and those previously submitted, certiorari should be granted here.

Respectfully submitted,

By _____
Timothy K. Ford
Attorney for Petitioner

September 12, 1990.

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OF COUNSEL

September 12, 1990

Joseph F. Spaniol, Jr., Clerk
Supreme Court of the United States
1 First Street N.E.
Washington, D.C. 20543

Re: Lankford v. Idaho, No. 88-7247

Dear Mr. Spaniol:

Enclosed is an original and ten copies of a Supplemental Memorandum Supporting Certiorari on behalf of the Petitioner in this case, together with a certificate of its service on the Respondent's counsel. Please bring this matter to the Court's attention at your earliest convenience.

Sincerely,

Timothy K. Ford

TKF/ls
Enclosures

cc: Lynn Thomas, Esq.
Joan Fisher, Esq.
Bryan Lankford

No. 88-7247

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

BRYAN STUART LANKFORD,

Petitioner,

v.

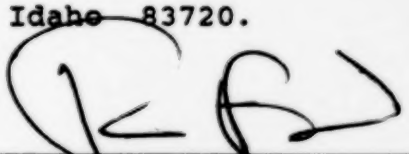
STATE OF IDAHO,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Idaho

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of September, 1990, I served a true and correct copy of the Petitioner's Supplemental Authority, by placing the same in the United States Mail, first class postage prepaid, addressed to Lynn E. Thomas, Solicitor General, State of Idaho, Boise, Idaho 83720.



Timothy K. Ford
Attorney for Petitioner

No. 88-7247

In The

Supreme Court of the United States

October Term, 1990

BRYAN STUART LANKFORD,

Petitioner,

v.

THE STATE OR IDAHO,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Idaho

JOINT APPENDIX

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Certiorari Granted October 15, 1990

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Chronological Listing of Relevant Dates

December 1, 1983 – Information charging first degree murder filed, Petitioner arraigned

March 27, 1984 – Petitioner's jury trial commences.

March 31, 1984 – Jury Instructed on felony murder, and aiding and abetting; Jury returns verdict of guilty on two counts of first degree murder

April 5, 1984 – State requests sentencing postponed until after trial of co-defendant; defense requests Notice of State's Intention to Seek the Death Penalty

May 17, 1984 – Court enters Order Re Sentencing Hearing requiring State to notify Court in writing of State's Intention to Seek and Recommend death penalty

September 13, 1984 – State files its formal notice that it would not be recommending the death penalty for either count of murder.

September 20, 1984 – Hearing on Petitioner's pro se Motion to Dismiss Attorney and Overrule Conviction, Appointment of Co-Counsel Fisher

October 10, 1984 – Hearing on Motion to Dismiss Attorney, trial counsel dismissed; Motions for Continuance, Motion for Typewritten Transcription, Motion for New Trial, all denied

October 11, 1984 – Petitioner testifies at co-defendant's Motion for New Trial

October 12, 1984 – Sentencing hearing, evidence and argument

October 15, 1984 –

[a.m.-p.m.] Co-defendant's sentencing hearing
[9:30 p.m.-9:58 p.m.] Trial Court sentences petitioner

to death and enters its Findings in Consideration of Death Penalty

October 16, 1984 – Formal Judgment and sentence of death entered.

November 29, 1984 – Petitioner's Petition for Post-conviction Relief filed

January 31, 1985 – Trial Transcript completed

June 24, 1985 – Hearing on Petitioner's Petition for Post-conviction Relief

June 26, 1985 – Trial court denies Petition for Post-conviction Relief

July 29, 1987 – Opinion and Judgment of Idaho Supreme Court affirming petitioner's conviction and sentence

October 20, 1987 – Order of Idaho Supreme Court denying petitioner's Petition for Rehearing entered

June 13, 1988 – The United States Supreme Court vacates judgment and remands to Idaho Supreme Court for reconsideration in light of *Satterwhite v. Texas*, 486 U.S. 249

April 4, 1989 – Opinion and Judgment of Idaho Supreme Court reaffirming prior decision

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF IDAHO, COUNTY OF IDAHO

Idaho

v. No. 20157

Bryan Stuart Lankford

[EXCERPT OF INITIAL APPEARANCE, PROCEEDINGS HELD OCTOBER 20, 1983]

[TRANSCRIPT PAGES 2-8]

* * *

The defendant, Bryan Stuart Lankford, appeared in person and without representation of counsel.

THE COURT: For the record, this is Case Number 21057, State of Idaho versus Bryan Stuart Lankford who is present in court without counsel. Mr. Lankford, this is an initial appearance, and what's going to happen is, I need to make sure you're very clear with what you are charged with, what the maximum penalty is, and what your rights are with respect to these charges. I do want to do that at this time.

I also want to talk to you about attorneys, too, to see whether or not you have an attorney, and if not, we're going to appoint an attorney.

First of all, the charges in this case, there are three counts in one complaint. The complaint is signed by Randy Baldwin, who is a deputy sheriff with the Idaho County Sheriff's office.

Count One of that complaint alleges that you and Mark Lankford, on June 21st, on or about June 21st, 1983, in the Summit Flat area of Idaho County, Idaho, near

Santiam Creek off of the South Fork of the Clearwater River, did then and there knowingly, willfully, intentionally, unlawfully, feloniously, deliberately, and with malice and forethought, kill and murder Robert Bravence by beating such person with unknown foreign objects until such person died of such injuries that he then and there sustained.

Such acts on the part of the defendants were deliberate – by defendants, I mean both you and Mark Lankford, were deliberate and premeditated and as a result of the beating and injuries sustained by the victim, that person, being Mr. Bravence, sickened and die in the County of Idaho, State of Idaho, on or about the 21st of June, 1983.

If that were true, that would violate Idaho Code Section 1814, 184001 and 4002. That's murder, and the maximum penalty that can be imposed in murder, the Judge can either impose a life sentence or the death penalty, one of those two things. There is no years, in other words, for burglary or something you could get a number of years in the penitentiary, but for murder it's either a life sentence or the death penalty.

In Count Number Two of the same complaint, that alleges that on the same date, June 21st, 1983, that you and Mark Lankford were then and there in the Summit Flat area of Idaho County, Idaho, near Santiam Creek off of the South Ford of the Clearwater River, and did then and there knowingly, willfully, intentionally, unlawfully, feloniously, deliberately, and with malice and forethought, kill and murder Cheryl Bravence, by beating said person with unknown foreign objects until said victim died of injuries that she then and there sustained.

Such acts on the part of you and Mark Lankford were deliberate and premeditated, and as a result of the beatings and injuries sustained by the victim, that's Mrs. Bravence, that person sickened and died in the County of Idaho, State of Idaho, on or about the 21st of June, 1983.

Again, that would be the same charge with respect to a different person. The maximum penalty, again, would either be life imprisonment or the death penalty.

Count Three alleges that on or about the 21st of June, 1983, that you and Mark Lankford did then and there knowingly, willfully, intentionally, unlawfully, feloniously and deliberately commit the crime of Grand Theft, by then and there taking, stealing, and driving away certain personal property belonging to another, that being a 1979 Volkswagon van bearing License Number 212 – AHL, from Texas, belonging to Robert Bravence and Cheryl Bravence when you and Mark Lankford at that time had the intent to deprive the owners there of permanently, and which van had a value at that time it was taken of more than one hundred fifty dollars lawful money in the United States of America.

That would violate Idaho Code Section 182403 if it was true. Maximum penalty would be up to a five thousand dollar fine, at least one year in the penitentiary and up to fourteen years in the penitentiary.

Do you have any questions about what you're charged with?

BRYAN STUART LANKFORD: Not particularly.

THE COURT: No questions, is that right?

BRYAN STUART LANKFORD: Yes.

THE COURT: All right. Now, let me advise you of your rights with respect to these charges.

Number one, you don't have to make any statement about these charges. You don't have to make any statement to me, or to the deputies or to anybody else, and that doesn't make any difference if you've made any statements in the past, that doesn't mean that you have to make any new statements.

Now, if you voluntarily made a statement to me or to the deputy or to anybody else, then that could be used against you at trial.

You do have a right to bail. Bail was set when the warrant was issued in this case, and once you have an attorney in this case you can ask that bail be reduced if you want to.

You do have a right to have an attorney to represent you. Do you have an attorney at this time?

BRYAN STUART LANKFORD: I'm not certain.

THE COURT: Not certain, okay. If you do not have money to hire a lawyer, then the court would appoint a lawyer to represent you at no expense to you. There is a phone down there, you can make a phone call to your family and so forth. If you find out that you don't have an attorney, or you can't hire an attorney, then you should contact the bailiff or the jailer, he will contact me, we will have another short hearing, and then I can talk to you about your finances and appoint a lawyer to represent you. You should do that right away though.

Okay, in a felony case such as this one, there are two hearings, or there are a maximum of two hearings.

Number one, there would be a preliminary hearing, and that preliminary hearing is held within fourteen days. The purpose of a preliminary hearing is to see if there is enough evidence to go to trial. That is held in front of a magistrate judge without a jury, you would be present, your attorney would be present, and the prosecuting attorney would be present.

Now, what the State has to prove at that hearing is, with respect to these charges, two things happened; Number One, that these crimes were committed, and Number Two, that you probably committed those crimes.

If the State does not prove both of those things, then the count is dismissed. If the State does prove both of those two things, then you would be bound over for trial in the District Court, you would appear in District Court within ten days from the preliminary hearing.

At that time, when you appear, or if you appear before the District Judge, then he would advise you of your rights again. He would also ask you if you plead guilty or not guilty.

If you plead not guilty in the District Court then your [sic] entitled to a trial and that trial would be in front of a twelve person jury.

Now, with respect to the preliminary hearing and the trial, you have certain rights. Number One, you have the right to ask questions of all of the witnesses that were called either at the preliminary or at trial.

Those witnesses would testify in front of you under oath, and they would have to answer your questions.

You're presumed innocent both at the preliminary hearing and at the trial, and you don't have to prove anything.

The State on the other hand, always has the burden. I mentioned the burden that they have at the preliminary hearing, at trial the State has the burden of proving guilt beyond any reasonable [sic] before you could be convicted of any of the three counts.

Now, even though you don't have any burden, you have the right to testify. However, if you do not testify, your silence will not be held against you in any way, and the jury would be specifically told that they can not hold your silence against you in any way.

You also have the right to call witnesses on your behalf at the preliminary hearing and at the trial, and you don't pay for that. All your attorney does is give the names to the court and they're ordered to come in and testify and it doesn't cost you anything at all.

Do you have and questions about that at all?

BRYAN STUART LANKFORD: (No audible response)

THE COURT: You're shaking your head negitively, okay. The preliminary hearing, as I said, has to be held within fourteen days. I'll set that tentatively for next Thursday, the 27th of October, at 9 o'clock in the morning.

If your attorney needs more time, and that's a possibility in a complicated case, then continuance can be granted, but I have to set it within fourteen days.

Do you have any questions about anything I've gone over so far?

BRYAN STUART LANKFORD: No.

THE COURT: Okay. What I'll do now, sir, if you'll be remanded to the custody of the Idaho County Sheriff, after you've had a chance to talk to – try and get a lawyer, let the Jailer know if you do have a lawyer or if you don't we'll have another short hearing so we can appoint one, and we need to do that right away if we're going to have a hearing next Thursday. We'll be in recess.

* * *

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

(Caption Omitted In Printing)

INFORMATION

DENNIS L. ALBERS, Prosecuting Attorney in and for Idaho County, State of Idaho, for and in behalf of the State of Idaho, comes into the above-entitled Court, in the year of 1983 and gives the Court to understand and be informed that the above-named defendant is held to answer to the District Court for the crime ___ of murder in the first degree,

which was committed as follows:

COUNT I

That, on or about the 21st day of June, 1983, in the County of Idaho, State of Idaho, the crime of murder in the first degree, was committed, by the above-named defendant, as follows:

That, the said defendant, Bryan Stuart Lankford, at the date, time, and place aforesaid, then and there being in the South Fork Area of Idaho County, Idaho, near Santiam Creek, did then and there knowingly, wilfully [sic], unlawfully, intentionally, feloniously, and with malice aforethought, deliberately kill and murder Robert Bravence, by beating such person with an unknown foreign object until said victim, Robert Bravence died of injuries that he then and there sustained. Such acts on the defendant were in the perpetration of a robbery from the person of Robert Bravence, who was then located along the South Fork of the Clearwater River in said county and state, and such beatings in the furtherance of the robbery resulted in

the death of Robert Bravence aforesaid, and said person sickened and died in the county of Idaho, state of Idaho, on or about the 21st day of June, 1983.

That, the acts of the defendant resulted in property being taken from the presence of Robert Bravence, with the intent to deprive Robert Bravence of such property permanently, and was taken from him by the application to his person of deadly force. All of such acts constitute a violation of Idaho Code §18-4001, 4003(d).

COUNT II

That, the said defendant, Bryan Stuart Lankford, at the date, time, and place aforesaid, then and there being in the South Fork Area of Idaho County, Idaho, near Santiam Creek, did then and there knowingly, willfully, unlawfully, intentionally, feloniously, and with malice aforethought, deliberately kill and murder Cheryl Bravence by beating such person with an unknown foreign object until said victim, Cheryl Bravence died of injuries that she then and there sustained. Such acts on the part of said defendant were in the perpetration of a robbery from the person of Cheryl Bravence, who was then located along the South Fork of the Clearwater River in said county and state,

Continued on next page. . . .

All of which is contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Idaho.

/s/ Dennis L. Albers
DENNIS L. ALBERS
Idaho County Prosecuting Attorney

(Affidavit Omitted In Printing)

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

COURT MINUTES

George Reinhardt
District Judge Presiding

Gloria McDougall
Reporter Tape Reading

Starla Coffman
Clerk

____ Term 19 ___

Thursday, Dec. 1, 1983
Judicial Day, Date,

at 9:20 a.m.
Time

Grangeville Idaho
Place

STATE OF IDAHO,
Plaintiff
vs.
MARK HENRY LANKFORD and BRYAN STUART LANKFORD,
Defendant

Docket No. 20157-20158

APPEARANCES:

Dennis L. Albers
For Plaintiff

Greg FitzMaurice and W. W. Longeteig
For Defendant

Subject of Proceeding: Arraignment

BE IT KNOWN, that the following proceedings were had, to-wit:

The Defendants are present in the courtroom.

Counsel agree to have the two defendants arraigned at the same time.

FitzMaurice waives the reading of the information.
Longeteig waives the reading of the information.
Court accepts the waivers.

Court advises the Defendants of their rights. Possible penalties are advised. Statutues [sic] are read.

Both defendants enter pleas of not guilty to both counts.

FitzMaurice requests a transcript of the Preliminary hearing.

Pre-trial Motions are scheduled for December 15, 1983 at 10 a.m. and on January 12, 1984 at 10 a.m..

Court orders preliminary hearing transcript prepared and to be completed by December 29, 1983.

Bail status is continued. Remanded to the custody of the Idaho County Sheriff's Department.

Recess: 9:46 a.m.

/s/ Starla Coffman
Deputy Clerk

APPROVED:

/s/ illegible
District Judge

Minute Book No. 9,
Page No. 1

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF IDAHO, COUNTY OF IDAHO

[EXCERPT FROM ARRAIGNMENT, PROCEEDINGS HELD DECEMBER 1, 1983]

[TRANSCRIPT PAGES 14-15]

(Caption Omitted In Printing)

* * *

THE COURT: With reference to Case 20157, State of Idaho versus Bryan Stuart Lankford, Mr. Lankford, in the event that you are convicted of either of the two charges set forth in the Information, Count One or Count Two, you can be punished as set forth in Idaho Code 184004, which provides as follows: Subject to the provisions of 19-2515 Idaho Code: Every person guilty of Murder in the First Degree shall be punished by death or by imprisonment for life. Every person guilty of Murder in the Second Degree, et cetera, et cetera. And that does not apply to you. So the maximum punishment that you may receive if you are convicted on either of the two charges is imprisonment for life or death. Do you understand the maximum penalty that you can receive for Count One wherein it is alleged that you murdered Mr. Robert Bravence?

MR. BRYAN LANKFORD: I understand.

THE COURT: And with reference to Count Two the same punishment can be imposed if you're convicted for that offense?

MR. BRYAN LANKFORD: Yes.

THE COURT: And that is imprisonment for life or death, do you understand that?

MR. BRYAN LANKFORD: Yes.

* * *

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF IDAHO, COUNTY OF IDAHO

[EXCERPT FROM COURT'S INSTRUCTIONS TO THE JURY GIVEN MARCH 31, 1984, INSTRUCTIONS, 21, 22, 23]

[RECORD, STATE V. BRYAN STUART LANKFORD, PAGES 271-273]

(Caption Omitted In Printing)

* * *

INSTRUCTION NO. 21

You are instructed that Idaho Code §18-204 provides as follows:

> 18-204. Principals defined. – All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . . are principals in any crime so committed . . . . and as such can be found guilty just as if they actually did commit the act constituting the offense.

Based upon that statute, it is therefore not necessary that the State prove that this defendant actually committed the act which caused the death of the victims, provided the State prove beyond a reasonable doubt that the defendant was present, and that he aided and abetted in the commission of the crime of robbery as alleged, or that if he was not present, that he advised and encouraged the commission of such crime

INSTRUCTION NO. 22

To "aid and abet" means to assist, facilitate, promote, encourage, counsel, solicit, or invite the commission of a crime.

INSTRUCTION NO. 23

If a human being is killed by any one of several persons engaged in the perpetration of the crime of robbery, all persons who either directly and actively commit the act constituting robbery or who with knowledge of the unlawful purpose of the perpetrator of the crime aid and abet in its commission, are guilty of murder of the first degree, whether the killing is intentional or unintentional.

Thus, if two or more persons acting together are perpetrating a robbery and one of them, in the course of the robbery and in furtherance of the common purpose to commit the robbery, kills a human being, both the person who committed the killing and the person who aided and abetted him in the robbery are guilty of Murder of the First Degree.

A killing that occurs within the perpetration of a robbery embraces not only the actual acts of the transaction, in this case the robbery, and the circumstances surrounding it, but also those acts immediately following it and so closely connected with it as to form in reality a part of the occurrence.

* * *

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF IDAHO, COUNTY OF IDAHO

[EXCERPT FROM HEARING ON PETITIONER'S REQUEST FOR A NEW ATTORNEY HELD JULY 9, 1984]

[TRANSCRIPT PAGES 18-19]

(Caption Omitted In Printing)

* * *

THE COURT: All right. Like I say, now is a good time to talk about it. So, then I guess what we'll do, Mr. Lankford, is to – I'll get back with you some time prior to sentencing; and we'll discuss your relationship with Mr. Mr. [sic] Longeteig. Is that an acceptable way for us to leave this now not to make any final decisions one way or the other? That is I won't say that you need –

MR. LANKFORD: Yes, it does. You know –

THE COURT: What I'm looking for is your input. I'm trying to find out if that's an acceptable solution for you people to try to work out your problems now and at least find out whether or not you're going to be able to put back that relationship. Right now, as I understand it, you don't know whether or not you will be able to put back –

MR. LANKFORD: That's true. I don't see where there's really been a relationship.

THE COURT: Okay.

MR. LANKFORD: Because of the uncorrespondence with myself. My life is on the line here.

THE COURT: All right. So, at this particular point in time you're satisfied that what we'll do is attempt to let

you people communicate more. He said he wants to call you a couple of times a week even if he doesn't have anything to tell you.

MR. LANKFORD: That's fine. That's fine. You know, I'm going to hire another lawyer; and, if they can work together, everything will be just fine.

THE COURT: All right. Is there anything further from the State?

MR. ALBERS: Nothing.

THE COURT: From the defense?

MR. LONGETEIG: No, your Honor.

THE COURT: From you, Mr. Lankford?

MR. LANKFORD: Not at this time.

THE COURT: All right. We'll be in recess.

(Thereupon court was in recess at 9:36 a.m.)

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

COURT MINUTES

The Honorable George Reinhardt
District Judge Presiding

Gloria McDougall
Reporter Tape Reading

Starla Coffman
Clerk

_____ Term 19 ___

Thursday, April 5, 1984
Judicial Day, Date,

at 9:53 a.m.
Time

Grangeville Idaho
Place

STATE OF IDAHO,
Plaintiff
vs.
BRYAN STUART LANKFORD
Defendant

Docket No. 20157

APPEARANCES:

Dennis L. Albers
For Plaintiff

W. W. Longeteig
For Defendant

Subject of Proceeding: Hearing to Schedule Sentencing

BE IT KNOWN, that the following proceedings were had, to-wit:

The Defendant is present in the courtroom.

Albers requests that the sentencing be scheduled after the jury trial on State of Idaho vs. Mark H. Lankford. Longeteig has no objection.

Court sets sentencing for June 21, 1984 at 2 p.m.

Court orders Probation and Parole to prepare a Pre-sentence Investigation Report.

Longeteig requests a complete psychological evaluation. Court grants the request.

Longeteig will have funds availabel [sic] to subpoena witnesses for sentencing.

Longeteig requests a time be set by which Albers must file a request for capital punishment in the event he intends to. Albers will advise when he knows if he is going to be requesting the death penalty.

Recess: 10:05 a.m.

/s/ Starla Coffman
Deputy Clerk

APPROVED:

/s/ illegible
District Judge

Minute Book No. 10,
Page No. 1

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

(Caption Omitted In Printing)

WHEREAS, a trial in the above matter was had resulting in a verdict being returned by the jury on March 31, 1984, finding the above named defendant guilty of the crime of Murder in the First Degree, two counts, an offense for which the death penalty is authorized; and,

WHEREAS, pursuant to the provisions of Rule 33.1, Idaho Criminal Rules, an Order was entered requiring that a Pre-Sentence Investigation be conducted by the Idaho Department of Probation and Parole and that a report thereof be filed with the Court; and,

WHEREAS, an Order was entered requiring that the Defendant be examined by Dr. Michael Estes, a Psychiatrist, and that a psychological report upon the condition of the defendant be filed with the Court,

IT IS HEREBY ORDERED AS FOLLOWS:

(1) Sentencing is set for June 28, 1984 at 2 p.m.;

(2) That the Pre-sentence Investigation Report required by rule 33.1 I.C.R. be filed with the Court on or before June 14, 1984;

(3) That the Psychological Evaluation be filed with the Court on or before June 14, 1984;

(4) That on or before June 18, 1984 counsel for the State and Defense shall file with the Court a statement as to whether or not they have received the two above mentioned reports;

(5) That on or before June 18, 1984 the State shall notify the Court and the Defendant in writing as to whether or not the State will be seeking and recommending that the death penalty be imposed herein. Such notification shall be filed in the same manner as if it were a formal pleading;

(6) That in the event the State shall seek and recommend to the Court that the death penalty be imposed herein the following shall be filed with the Court on or before June 18, 1984:

(a) The State shall formally file with the Court and serve upon counsel for the Defendant a statement listing the aggravating circumstances enumerated in Idaho Code §19-2515(f) that it intends to rely upon and prove at the sentencing hearing to justify the imposition of the death penalty;

(b) The Defendant shall specify in a concise manner all mitigating factors which he intends to rely upon at the time of the sentencing hearing.

Dated this 17th day of May, 1984.

/s/ George Reinhardt
GEORGE REINHARDT
District Judge

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

(Caption Omitted In Printing)

WHEREAS, a trial in the above matter was had resulting in a verdict being returned by the jury on March 31, 1984, finding the above named defendant guilty of the crime of Murder in the First Degree, two counts, an offense for which the death penalty is authorized; and,

WHEREAS, pursuant to the provisions of Rule 33.1, Idaho Criminal Rules, an Order was entered requiring that a Pre-Sentence Investigation be conducted by the Idaho Department of Probation and Parole and that a report thereof be filed with the Court; and,

WHEREAS, an Order was entered requiring that the Defendant be examined by Dr. Michael Estes, a Psychiatrist, and that a psychological report upon the condition of the defendant be filed with the Court,

IT IS HEREBY ORDERED AS FOLLOWS:

(1) Sentencing is set for October 12, 1984 at 9 a.m.;

(2) That on or before September 24, 1984 the State shall notify the Court and the Defendant in writing as to whether or not the State will be seeking and recommending that the death penalty be imposed herein. Such notification shall be filed in the same manner as if it were a formal pleading;

(3) That in the event the State shall seek and recommend to the Court that the death penalty be imposed herein the following shall be filed with the Court on or before September 24, 1984:

(a) The State shall formally file with the Court and serve upon counsel for the Defendant a statement listing the aggravating circumstances enumerated in Idaho Code §19-2515(f) that it intends to rely upon and prove at the sentencing hearing to justify the imposition of the death penalty;

(b) The Defendant shall specify in a concise manner all mitigating factors which he intends to rely upon at the time of the sentencing hearing.

Dated this 6th day of September, 1984.

/s/ George Reinhardt
GEORGE REINHARDT
District Judge

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

(Caption Omitted In Printing)

COMES NOW, Dennis L. Albers, in relation to the Court's Order of September 6, 1984, and makes the following response.

In relation to the above named defendant, Bryan Stuart Lankford, the State through the Prosecuting Attorney *will not* be recommending the death penalty as to either count of first degree murder for which the defendant was earlier convicted.

DATED this 13 day of September, 1984.

/s/ Dennis L. Albers
DENNIS L. ALBERS

(Certificate Of Mailing Omitted In Printing)

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

COURT MINUTES

The Honorable George Reinhardt
District Judge Presiding

_____ Term 19 ___

Thursday, Sept. 20, 1984
Judicial Day, Date,

Lorri Schmidt
Reporter Tape Reading

at 10:47 a
Time

Starla Coffman
Clerk

Grangeville Idaho
Place

STATE OF IDAHO, Plaintiff
vs.
BRYAN S. LANKFORD Defendant

Docket No. 20157

APPEARANCES:

Dennis L. Albers
For Plaintiff

W. W. Longeteig
For Defendant

Subject of Proceeding: Motion to Dismiss Counsel and Overturn Conviction

BE IT KNOWN, that the following proceedings were had, to wit:

The Defendant is present in the courtroom.

Court reviews case history.
Lankford speaks.

Court finds that there has been a significant amount of conflict between Lankford and Longeteig.

Lankford and Longeteig have no objections to the Court appointing co-counsel.

Court appoints Joan Fisher as co-counsel.

Lankford advises that he is under no medication, alcohol or drugs at this time.

Recess: 11 a.m.

/s/ Starla Coffman
Deputy Clerk

APPROVED:

/s/ illegible
District Judge

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Page No. 1

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

[EXCERPT FROM HEARING ON PETITIONER'S MOTION TO DISMISS ATTORNEY HELD THE 20TH DAY OF SEPTEMBER, 1984]

[TRANSCRIPT PAGES 8-11]

(Caption Omitted In Printing)

* * *

THE COURT: If I were to appoint a new lawyer to represent you –

THE DEFENDANT: Yes, sir.

THE COURT: – would you have any objection to that lawyer talking to Mr. Longeteig and working with Mr. Longeteig to try to better understand you, your situation in the case?

THE DEFENDANT: Not at all.

THE COURT: So are you suggesting that I appoint you a new lawyer to – in essence, to work as cocounsel to function in between you and Mr. Longeteig or to work with you and to aid Mr. Longeteig in a further presentation of your case?

THE DEFENDANT: Yes, that sounds reasonable to me.

MR. LONGETEIG: I would certainly have no objection to that procedure.

THE COURT: All right. What I will do in this matter, because I do find that there has been a significant amount of conflict between Mr. Longeteig and Mr. Lankford, for

right reasons or wrong reasons. The point is: There has been significant amount of conflict and that conflict apparently has resulted in a breakdown of communications, and at least at one point, I am advised that you wouldn't speak to Mr. Longeteig. Is that right, Mr. Longeteig?

MR. LONGETEIG: That's correct.

THE COURT: And Mr. Lankford?

THE DEFENDANT: That's correct.

THE COURT: So I feel that it would be appropriate to have another lawyer work as cocounsel with Mr. Longeteig. Apparently, there would be no objection from the defendant or the defendant's counsel.

THE DEFENDANT: There's none on my part.

MR. LONGETEIG: I would be happy to work with someone the Court appoints, your Honor.

THE DEFENDANT: Another reason that I wish to have that is so that – not only that we don't communicate enough – is that I need people – someone to go to Texas for me and help get my witnesses for my sentencing, and I also need someone up here working my case to get it prepared because I'm not a lawyer. I can't do it properly.

THE COURT: Well, I will appoint cocounsel in this matter. I might mention to you, Mr. Lankford, that in the event that you have any further difficulties with counsel or any thoughts about new lawyers, that those should be voiced to me immediately as you are – or let me ask you: Are you aware that your sentencing is scheduled for October 12?

THE DEFENDANT: I was made aware of that Tuesday.

THE COURT: And in the event that you had notions of hiring private counsel, that private attorney very well may tell me that he's not in a position to attend your Sentencing Hearing on the 12th because of prior obligations or inability to properly prepare because of a prior heavy schedule and, then, that attorney would be requesting a continuance of a sentencing date from me, and if you contacted counsel, for instance, on the 11th of October and made such a request, you should not think that I will automatically grant that request for a continuance.

THE DEFENDANT: I don't think that at all.

THE COURT: Pardon me?

THE DEFENDANT: I don't think that – I'm not taking it for granted that you would do that.

THE COURT: Right. And the reason for that is, as you can very well see, that if I do postpone sentencing until December 1st and you come to me at the end of November and say, "I want to fire him because I can't get along with him." The new lawyer comes to me and says, "I can't get ready for a sentencing tomorrow; I want a postponement," and on and on forever, and it gets to the point where, obviously, you can never be sentenced.

THE DEFENDANT: I want to be sentenced as soon as possible, but I want to be fairly represented.

THE COURT: I understand that, and that's why I've decided to appoint cocounsel in this case.

THE DEFENDANT: I appreciate it.

THE COURT: Counsel is Ms. Fisher from Lewiston, Idaho. She will be given an opportunity to meet with you and Mr. Longeteig today.

Is there anything further from the State?

MR. ALBERS: We have nothing, your Honor.

THE COURT: From the defense?

MR. LONGETEIG: Not at this time, your Honor.

THE COURT: Ms. Fisher, I note you are in court. Are you in a position to take this case on?

MS. FISHER: Yes, your Honor.

THE COURT: All right. We'll be in recess.

MR. ALBERS: Your Honor, did the Court want to make a record about the medication that the defendant has been on? Sometimes people say they're under medication and they didn't know what they were doing at the time or they took drugs.

THE DEFENDANT: I'm not under any medication at this time.

* * *

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

(Caption Omitted In Printing)

MOTION FOR FORMAL SENTENCING

COMES NOW the defendant, Bryan Stuart Lankford, by and through his attorney of record, Joan Fisher of Fitzgerald, Sims & Fisher and files this Motion pursuant to Idaho Code 19-2516 and requests formal sentencing hearing and formally objects to the use of any affidavit or hearsay testimony other than defendant's pre-sentencing investigation and oral testimony presented at the hearing on sentencing.

Date this 2 day of October, 1984.

Respectfully submitted.

FITZGERALD, SIMS & FISHER
Attorney at Law

/s/ Joan Fisher
Joan Fisher
Attorney for Defendant

(Certificate Of Service Omitted In Printing)

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

(Caption Omitted In Printing)

RESPONSE TO ORDER CONCERNING SENTENCING

COMES NOW, Joan Fisher of Fitzgerald, Sims & Fisher, attorney for the defendant, in relation to the Court's Order of September 6, 1984, and makes the following response: mitigating factors which defendant intends to rely upon at the time of Sentencing Hearing include:

1. That defendant Bryan Stuart Lankford did not participate in the killings.

2. Defendant Bryan Stuart Lankford's psychological state is such that his participation in the robbery was a result of coercion and duress from the defendant Mark Lankford.

3. The defendant Bryan Stuart Lankford is not a threat to society.

4. The defendant Bryan Stuart Lankford is capable of rehabilitation, in need of psychological treatment and does not represent a threat to society.

Dated this 2 day of October, 1984.

FITZGERALD, SIMS & FISHER
Attorneys at Law

/s/ Joan Fisher
by Joan Fisher

(Certificate Of Service Omitted In Printing)

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

(Caption Omitted In Printing)

MOTION FOR CONTINUANCE

COMES NOW, defendant, Bryan Stuart Lankford, by and through his attorney of record, Joan Fisher of Fitzgerald, Sims & Fisher, and respectfully moves this Court for a continuance in the matter of Sentencing. In support of said Motion defendant would show the Court the following:

1. That a material and relevant witness to sentencing, namely, Gretchen Maurer of San Antonio, Texas, is unable to attend sentencing due to medical reasons on October 12, 1984 but will be available to testify in behalf of the defendant in approximately four (4) weeks.

2. That a witness who is material and relavant [sic] to the issue of mitigation and sentencing, namely, Judy Risinger of Houston, Texas will be irreparably financially injured if she is required to testify on October 12, 1984, but is available to testify in approximately four (4) weeks.

This Motion is based upon the supporting affidavit filed herewith, the record and pleadings filed herein and is not made for the purposes of delay but for just cause.

Dated this 2 day of October, 1984.

FITZGERALD, SIMS & FISHER
Attorneys at Law

/s/ Joan Fisher
Joan Fisher
Attorney for Defendant

(Certificate Of Service Omitted In Printing)

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

(Caption Omitted In Printing)

AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE

Joan Fisher, being first duly sworn deposes and says as follows:

I.

That I am the attorney of record for Bryant Stuart Lankford and was so appointed on September 20, 1984.

II.

That the defendant is set for sentencing on October 12, 1984.

III.

That I have investigated and prepared this matter for sentencing to the extent possible under the limited time available.

IV.

That I have talked personally with Mrs. Gretchen Maurer, the defendant's mother, on October 1, 1984 and she advised me of the following:

a. That she is the defendant's mother and that she is willing to testify in behalf of the defendant to the defendant's character, to his propensity to non-violence, to the

likelihood of his rehabilitation; to the relationship between her son, Bryan Lankford and Mark Lankford as one of domination and coersion [sic]; to the violent nature of Mark Lankford who has on numerous occasions threatened to kill Mrs. Maurer and her sons, and to her belief that he is a dangerous person capable of committing the acts; to her disbelief that Bryan Lankford is capable of committing murder and that he is incapable of participating thereto and to her belief that based on her knowledge of the defendant, she does not believe that the defendant knew or participated in the killings.

b. That she underwent surgery approximately two (2) weeks ago and is presently physically incapable of attending the Sentencing Hearing set for October 12, 1984 due to her doctor's refusal to release her for such matter.

c. That she is willing to testify to the above stated matters as soon as her doctor releases her for such purpose.

V.

That on October 1, 1984, this affiant called the physican [sic] of Gretchen Maurer, namely, Dr. Risuntko, of San Antonio, Texas, and discussed with him the physical condition of Mrs. Maurer. Dr. Risuntko advised me that she would be physically able to travel to Idaho in approximately four (4) weeks time and that he would release her for such purpose at that time.

* * *

(Jurat And Certificate Of Service Omitted In Printing)

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

(Caption Omitted In Printing)

MOTION FOR CONTINUANCE OF MOTION FOR NEW TRIAL AND SENTENCING

COMES NOW the Defendant, Bryan Stuart Lankford, by and through his attorney of record, Joan Fisher of Fitzgerald, Sims & Fisher, and moves this Honorable Court for a continuance of defendant's Motion For New Trial set for October 10, 1984 at the hour 9:00 o'clock a.m. and for continuance in the Sentencing of defendant's [sic] set for October 12, 1984 at the hour of 9:00 o'clock a.m..

In support of said Motion, defendant would show the Court the following:

1. Defendant's attorney of record, Joan Fisher was appointed on September 20, 1984.

2. Defendant's attorney has investigated and prepared said matter with due diligence;

3. Defendant's attorney was not involved in the trial of this matter and has determined upon her investigation and preparation that it is impossible to adequately representive the defendant at the Sentenceing [sic] and Motion for New Trial without further investigation, preparation, and research of the matters therein.

This Motion, based on the records and files herein and the attached Affidavit, is made for good cause and not for reasons of delay.

Dated this 5 day of October, 1984.

/s/ Joan Fisher
Joan Fisher

(Certificate Of Service Omitted In Printing)

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

(Caption Omitted In Printing)

AFFIDAVIT IN SUPPORT OF MOTION FOR CONTINUANCE

Joan Fisher, being first duly sworn deposes and says as follows:

I.

That I am the attorney of record for Bryant Stuart Lankford and was so appointed by the Court on September 20, 1984.

II.

That I have diligently prepared and investigated the above-numbered and styled matter and attempted to prepare for Motion For New Trial set October 10, 1984 and Sentencing set for October 12, 1984.

III.

That I have attached to this Affidavit a summary of the investigation and preparation thus far conducted and approximate time spent therein.

IV.

That prior to the appointment on September 20, 1984, I had not association with or personal knowledge of the

facts and circumstances surrounding the above-numbered and styled case.

V.

Upon my investigation and preparation in this matter, I caused to be filed on October 4, 1984 a Motion For new Trial on the basis of ineffective assistance of counsel. Said Motion was made in good faith and affiant verily believes that interests of justice, protection of the rights of the defendant, ans [sic] adequate representation thereof demanded the filing of the Motion For New Trial on said grounds.

VI.

I cannot adequately represent my client at the Motion For New Trial nor the Sentencing without additional time to carefully review the trial record, and investigate matters therein.

VII.

I have consulted with one David Z. Nevin, on October 4, 1984 whose qualifications and experience establish him as an expert in the field of criminal law in Idaho and he has advised me that he is willing, able and competent to review the records and files herein and render an opinion as to the effectiveness of counsel under the current laws and standards set therein but would be unable to render such an opinion without the trial transcript, as well as additional time to review the files therein.

VIII.

That my investigation and preparation leads me to believe that the following persons are material and necessary witnesses for the Sentencing hearing set for October 12, 1984: Colleen Lankford, Robert Lankford, Greta Maurer; that said witnesses are material and necessary, have personal knowledge of facts and circumstances which are necessary and material to the Sentencing, which would not be cumulative and is of a nature that each is in possession of independent facts unknown to the others or the witnesses heretofore set to appear at Sentencing and further, that said witnesses are unable to attend without a Subpoena; that this affiant has had insufficient time to draft said subpoenas will present the same to the Court as soon as practicable for its consideration;

IX.

Based on my investigation and preparation it is my opinion that the following matters must be throughly [sic] researched in order to adequately represent my client at the Motion For New Trial:

a. Ineffective assistance of counsel under the laws of the State of Idaho and the United States Constitution;

b. Motions to Suppress and illegal confessions;

c. Defenses of coerison [sic] and duress;

d. Intoxication as mitigation and as relevant to the issue of intent;

e. Feloney [sic] Murder Doctrine as applied in the State of Idaho;

f. The use of expert psychological testimony to establish a lower degree of intent as well as defenses of coersion [sic] and duress and failure to pursue said testimony as ineffective assistance of counsel;

g. Failure to move for a change of venue as ineffective assistance of counsel and the burden of proof necessary thereon;

h. Failure to request adequate jury instructions as ineffective assistance of counsel;

i. Argument of counsel at Sentencing based upon defendant's statements made prior to, which are legally suspect, as waiver of error in regard to those statements;

j. Failure of trial counsel to move for a psychological [sic] when grounds exist to believe that said psychological evaluation of the defendant is material and necessary for the defense of said matter as ineffective assistance of counsel and the necessary burden of proof thereon.

X.

That affiant has retained the aid and assistance of law students to research such matters but the brevity of time between now and October 10, 1984 and October 12, 1984 make it impossible for this affiant to be sufficiently familiar with said issues to adequately represent her client at the Motion For New Trial and Sentencing.

XI.

That affiant is aware that witnesses from out of state are currently scheduled to arrive for testimony at the Motion For New Trial and Sentencing herein and has no opposition to the Court's consideration of those witnesses testimony on October 10, and October 12, 1984 in order to avoid undue costs to the State of Idaho and County of Idaho, subject to this Motion For Continuance for additional evidence and argument of counsel on the matters.

XII.

That affiant believes, subject to immediate preparation of the trial transcript, that she is in need of no less than thirty (30) days to properly prepare and investigate this matter due to its complexity.

XIII.

That defendant's Motion For New Trial was filed in order to timely present said issues before the trial court for its consideration and to avoid undue delay in requiring defendant to collaterally attack said conviction through use of the Uniform Post Conviction Procedure Act; that failure of the Court to grant a continuance on said matters will compel affiant to move for a withdrawal of consideration of the trial court of matters alleged in the Motion For New Trial to avoid undue prejudice to the defendant's rights to collateral attack and would thereby result in additional costs and delay to the Court in the consideration of the matters alleged in the Motion For New Trial.

Dated this 5 day of October, 1984.

FITZGERALD, SIMS & FISHER
Attorneys at Law

/s/ Joan Fisher
by Joan Fisher
Attorney for Defendant

(Jurat And Certificate Of Service Omitted In Printing)

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

(Caption Omitted In Printing)

MOTION FOR TYPEWRITTEN TRANSCRIPT

COMES NOW the defendant, Bryan Stuart Lankford by and through his attorney of record Joan Fisher of Fitzgerald, Sims & Fisher, and moves this Honorable Court to order a typewritten transcript of the trial and all preliminary matters other than the preliminary hearing, which have not yet been transcribed. This motion is based on the records and files herein and the attached affidavit.

Dated this 5 day of October, 1984.

FITZGERALD, SIMS & FISHER
Attorneys at Law

/s/ Joan Fisher
by Joan Fisher

(Certificate Of Service Omitted In Printing)

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

COURT MINUTES

The Honorable George Reinhardt District Judge Presiding	_____ Term 19__ Wednesday, Judicial Day,
Lorri Schmidt Reporter Tape Reading	October 10, 1984 at 3:10 p.m. Date, Time
Starla Allen Clerk	Grangeville, Idaho Place
STATE OF IDAHO, Plaintiff vs. BRYAN STUART LANKFORD, Defendant	Docket No. 20157 APPEARANCES: Dennis L. Albers For Plaintiff Joan Fisher W. W. Longeteig For Defendant

Subject of Proceeding: Motion Hearing

BE IT KNOWN, that the following proceedings were had, to-wit:

The Defendant is present in the courtroom.

Fisher argues on behalf of her motion to dismiss attorney.
Court speaks. Court allows Longeteig out of the case but he must remain available to talk with Fisher is [sic] she needs to speak with him.

Fisher argues on behalf of her motion for a typewritten transcript.
State resists the motion.
Court denies the motion.

Fisher argues on behalf of her motion for continuance of motion for new trial and of the sentencing.
State resists the motion.
Fisher speaks.
Fisher argues further.
Court denies the motion.

Fisher proceeds on her motion for a new trial.

Wilfrid Longeteig is sworn and testifies.
Fisher direct examination.

Recess: 4:48 p.m. Reconvened: 6:03 p.m.

All parties previously announced are present.

Wilfrid Longeteig resumes the stand.
Fisher continues direct examination.
Albers cross examination.
Witness resumes his seat.

/s/ Starla Allen
Deputy Clerk

APPROVED:
/s/ Illegible
District Judge

Minute Book No. 10,
Page No. 1

___ Term, 19 ___

Wednesday, October 10, 1984 at 3:10 p.m.
Judicial Day, and Date

State of Idaho, Plaintiff vs. Bryan Lankford Defendant
Docket #20157 Subject of Proceeding: Motion Hearing

Recess: 6:53 p.m. Reconvened: 7:15 p.m.

All parties previously announced are present.

Mary Margaret Lankford is sworn and testifies.
Fisher direct examination.
Witness is excused.

Roy Ralmuto is sworn and testifies.
Fisher direct examination.

Albers cross examination.
Fisher re-direct examination.
Witness is excused.

Margaret Case is sworn and testifies.
Fisher direct examination.
Witness is excused.

Judy Reisinger is sworn and testifies.
Fisher direct examination.
Witness is excused.

Kathryn M. Hedberg is sworn and testifies.
Fisher direct examination.
Albers cross examination.
Witness is excused.

Bryan S. Lankford is sworn and testifies.
Fisher direct examination.
Albers cross examination.
Witness resumes his seat.

Roy Ralmuto, previously sworn, resumes the stand.
Albers direct examination.
Fisher cross examination.
Albers re-direct examination.
Witness resumes his seat.

Wilfrid Longeteig, previously sworn, resumes the stand.
Albers direct examination.
Fisher cross examination.
Witness resumes his seat.

Recess: 8:36 p.m. Reconvened: 9:30 a.m.

All parties previously announced are present.

Fisher argues on behalf of her motion.
Albers resists the motion and submits it without argument.
Court denies the motion.

Minute Book No. 10 Page No: 2

Approved:

/s/ Illegible
District Judge

___ Term, 19 ___

Wednesday, October 10, 1984 at 3:10 p.m.
Judicial Day, and Date

State of Idaho, Plaintiff vs. Bryan Lankford Defendant

Docket #20157 Subject of Proceeding: Motion Hearing

Fisher requests a continuance in regard to the motion for a new trial that had previously been filed by Longeteig.
Court denies the continuance.
Fisher has nothing further to offer at this time.
Court denies the motion.
Court denies the motion for continuance for trial.

Recess: 10:22 a.m.

Minute Book No. 10 Page No: 3

Approved:

/s/ Illegible
District Judge

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF IDAHO, COUNTY OF IDAHO

[EXCERPT FROM HEARING ON DEFENDANT'S MOTION TO DISMISS TRIAL ATTORNEY, MOTION FOR TYPREWRITTEN [sic] TRANSCRIPT, AND MOTIONS FOR CONTINUANCES HELD ON THE 10TH DAY OF OCTOBER, 1984]

[TRANSCRIPT PAGES 14-37]

(Caption Omitted In Printing)

OCTOBER 10, 1984, WEDNESDAY,
GRANGEVILLE, IDAHO, 3:08 P.M.

THE COURT: For the record, this is 20157, *State of Idaho versus Bryan Lankford*. The record will reflect that Mr. Lankford – Bryan Lankford is present in court with counsel, Mr. Longeteig, and cocounsel, Ms. Fisher. A number of Presentence Motions have been filed. There is pending a Motion to Dismiss Attorney. It would appear that it would be appropriate to deal with that Motion first. Would you agree, counsel?

MS. FISHER: Yes, your Honor, I would.

MR. ALBERS: Yes, your Honor.

MR. LONGETEIG: I'd also agree, your Honor.

THE COURT: You may proceed.

MS. FISHER: Your Honor, at this time, the defendant would request that the Court dismiss cocounsel Wilfred Longeteig on the basis of the allegations contained within the Motion for New Trial, which renders, I think, it impossible for Mr. Longeteig to continue to represent Mr. Lankford.

THE COURT: And are you telling me, counsel, that Mr. Bryan Lankford does not want Mr. Longeteig to represent him any further?

MS. FISHER: That's correct, your Honor.

THE COURT: Well, Mr. Lankford, do you understand that I simply cannot force you to have Mr. Lankford – excuse me – Mr. Longeteig as an attorney? Do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: I think I've told you that before: That I can't force anyone on you that you don't want. You have a choice either to represent yourself or to stay with your present counsel. In this particular situation, two attorneys were representing you or two attorneys are representing you.

THE DEFENDANT: Yes, sir.

THE COURT: Ms. Fisher, the record will reflect, was appointed as cocounsel in this case because of some problems that you said you and Mr. Longeteig were having, and at that time, I told you, I think the record would reflect, that this occurs quite often. That is, specifically, that individuals who have been convicted of crimes and are awaiting sentencing will often attempt to discharge counsel at the last moment in an attempt to secure a continuance or a postponement to delay sentencing, and I told you that, in the event I appointed cocounsel in this case, Ms. Fisher, that would not necessarily mean that, in the event that she had a dispute with Mr. Longeteig as to how she wanted to proceed or how she wanted

to do something, that I wouldn't simply grant a continuance because she wanted one, and that was one of the disadvantages that would accrue in the event that Mr. Longeteig is dismissed from this case because, obviously, she may see things different than the way he sees it. He is prepared for sentencing in this case. Mr. Albers is prepared for sentencing. The Court has prepared for sentencing and, now, by putting Ms. Fisher in here at your request at the last moment and, then, dismissing Mr. Longeteig may result in a situation and will result in a situation, I'm sure, that she will be asking for a continuance or a postponement and, again, I will reiterate that I am not in a position to grant a continuance simply because she asks for one. I am also not indicating that the reason you are moving for a continuance is to simply delay sentencing or postpone punishment in this case, but I say that because it is a common occurrence and one the courts are faced with on a regular basis. So, again, I simply reiterate to you that simply because you're complaining about Mr. Longeteig, simply that now you're moving to dismiss him, does not mean that you'll secure or gain, automatically, a continuance of your sentencing today. On the other hand, as I said, the Constitution does dictate or require that I not force you to have counsel if you don't want that counsel, and are you standing, therefore, on your Motion to Dismiss Mr. Longeteig?

THE DEFENDANT: Yes, I am.

THE COURT: In view of that, Mr. Longeteig is re-of [sic] his obligation of representation. However, I will not dismiss Mr. Longeteig as far as an obligation that he has now to stand in the wing, so to speak, to be available to Ms. Fisher and yourself at such time as yourself or Ms.

Fisher would request his assistance. The time and preparation that he put in this case is adversely reflected by the record. He sat through the trial in this case. He's intimately familiar with the testimony. I believe he sat through the Preliminary Hearing, as well, so he's heard all the testimony twice. Your lawyer has not heard it once, and so she is forced to rely on recordings, transcripts, Preliminary Hearing transcripts, and, now, she will also have this other tool, that is, Mr. Longeteig to rely on when and if she might need him. Do you understand the nature of your obligation, Mr. Longeteig?

MR. LONGETEIG: Yes, I do, your Honor.

THE COURT: And do you have any objection to that, Ms. Fisher? That is, specifically that he remain available and talk to you, if you so wish to speak to him, and that he remain available to give you any information that you may need concerning this case.

MS. FISHER: I have no objection to that, your Honor.

THE COURT: I'll let you choose the next matter that you need to deal with.

MS. FISHER: The next Motion I'd like to address your Honor, is the Motion for the Typewritten Transcript. I have – as you indicated, I was appointed on September 20th. I was not here during the trial. I've heard no testimony on what has gone before, so what I know is basically what I've read in the Lewiston Tribune. Upon my –

THE COURT: You mean trial testimony?

MS. FISHER: Trial testimony. That is correct. Well, you know, the Motion goes to all typewritten transcripts, including the Arraignment and any appearances that my client made in court in Idaho County because the minutes reflect the appearance, but they don't reflect what occurred at that particular time. One of the – you know, I understand the Court's hesitancy in granting this type of Motion, but I'm in a position where I don't know what happened at trial. I have done my best to discover what happened at trial. I have talked with my client. I have talked with witnesses that attended the trial. I have talked with Mr. Albers. I have talked with Mr. Fitzmaurice, and I have attempted to talk to Mr. Longeteig, but until the Court make it clear that Mr. Longeteig was to talk to me, talking to Mr. Long – I got no response, and consequently, you know, at this particular time, I assume that Mr. Longeteig is available, and as of yesterday, he was available to talk to me. At that point, I was in a position to – of trying to talk to witnesses that I was bringing in, of trying to get everything organized, and I have not had the opportunity to sit down with Mr. Longeteig and discuss the various witnesses. I believe that the transcript recordings are going to be available to me. To this point, they have not been available to me. Consequently, you know, I reurge my Motion. If I had a Motion for – I mean if I had a typewritten transcript, I could go through that and I could fully investigate the allegations of our Motion for New Trial.

THE COURT: Well, you've had an opportunity to review the Presentence Investigation – the Preliminary Hearing, rather.

MS. FISHER: Yes, I have, your Honor.

THE COURT: All right. What's the State's position here?

MR. ALBERS: Your Honor, we would resist this Motion for the reason that there is an adequate record available of what these witnesses – what their – what they had to say, and that Mr. Longeteig can provide to Ms. Fisher any possible change between the Preliminary Hearing transcript and Bryan Lankford's trial. As I recollect that – I've heard it three times. The Bryan Lankford trial was almost verbatim to the Preliminary Hearing, with the exception of witness Kimberly Bourne, who was not brought on as a witness, and the discovery materials that were provided to Mr. Lankford were also provided to Mr. Longeteig at the same time, even before the Preliminary Hearing. Stack of material ten inches high, and that's all available of what the witnesses were going to say, what they did say at the Preliminary Hearing, and he can provide the assistance to indicate any differences between that trial testimony and the Preliminary Hearing. I don't think that it's necessary for her to become educated about the – what happened at trial. We resist.

THE COURT: Well, certainly, I think it's important that she become educated with what happened at trial. It appears to me, however, that she basically has been educated with what happened at trial.

Mr. Longeteig, you attended the trial. You attended the Preliminary Hearing. Is it your understanding that the matters set forth at the Preliminary Hearing closely parallel, in every significant aspect, that what occurred at the trial?

MR. LONGETEIG: Your Honor, I don't recall any instance in the trial when we were able to successfully impeach any witness on prior inconsistent statements, and we did – both by client and I followed along with the transcript during the testimony.

THE COURT: Specifically, my question is: Was the evidence at the Preliminary Hearing that was offered and admitted, does that parallel in every significant way and evidence offered at the trial?

MR. LONGETEIG: Yes, to the best of my knowledge, insofar as it concerned the same witnesses, yes.

THE COURT: And so with reference to sentencing preparation in an effort to gather a knowledge of what happened at the trial, would a review of the Preliminary Hearing supply that?

MR. LONGETEIG: Would it what, your Honor?

THE COURT: I'll say it again because it was probably confusing. In an effort to prepare for sentencing, if one wanted to review a transcript of the trial, could one receive the same benefits by reviewing the Preliminary Hearing transcript?

MR. LONGETEIG: I don't know if – I've heard both. It's probably easier for me to say "Yes," but I – I don't know for sure.

THE COURT: That's all we're asking, I guess, is your understanding of the situation because we have to rely on your memory. I suppose you would have to rely on your memory if you were going to be at the Sentencing Hearing, but as far as you are concerned, the information contained at the Preliminary Hearing, in essence, is

the same as the information that was brought forth at trial.

MR. LONGETEIG: Well, I don't know of any material differences, no.

MR. ALBERS: Your Honor, I believe there is in existence a transcript of Bryan Lankford's testimony at his trial that has been typed.

THE COURT: Yeah. Specifically, that's very important, of course. Has counsel had a chance to review the Preliminary Hearing transcript?

MS. FISHER: That's correct, your Honor.

THE COURT: Now, the record will reflect that I've ordered the tapes to be available today. It is my understanding, we hope, that you will be able to get tapes of the actual trial, so in the event you do believe that there are any differences or if you simply want to verify one point or another or compare the transcript to the tape, I hope that you'll be able to do that, and we're involved in trying to set up arrangements to have that accomplished tonight, and there may be no difference whatsoever between the material that is set forth in the transcript you already have and the transcript that you are requesting, to any significant degree, that would affect sentencing or the way that you would prepare for sentencing.

Furthermore, the Motion may be somewhat premature in that, as you indicated, you haven't yet had very adequate time to talk to Mr. Longeteig, perhaps, concerning questions that I just posed to him. Maybe you would like to do that with him and keep the Court continually advised as to the status of your desire for a transcript.

But, again, we're dealing with a situation where a defendant may absolutely subjectively find fault with counsel, have the Court discharge that attorney and, then either obtain a new attorney through his own means, financially or otherwise, and that attorney would, then, stand before me doing exactly what you're doing, Ms. Fisher. That is, asking for a continuance to get a copy of the transcript and, obviously, if I gave you that continuance, I set sentencing up for December 1st, and on November 29th, that Mr. Lankford comes in here, discharges you, hires another counsel, and that counsel would, obviously, then tell me he needs time to get a transcript or to review additional materials that you didn't want, and we could do that forever and ever, and, obviously, Mr. Lankford would never face punishment. He has been told about that for some time.

MS. FISHER: If I could respond, your Honor, simply for the record –

THE COURT: Yeah.

MS. FISHER: – as to the implication. Mr. Lankford has no desire to have this matter postponed any longer than necessary. That's why he agreed with the Court to keep Mr. Longeteig on and have a cocounsel situation, in hopes that we could work together and we would be ready, and I don't think that it's – you know, I don't think it's fair to say that because this is common that in this situation that's what occurs. Mr. Lankford is – you know, he would like to get the thing moving. I'm in a position where I have to say in order to adequately represent him, I need a copy of the transcript.

THE COURT: Alls I can say is that he's been involved with Mr. Longeteig for a long time, and at the last minute, you know, there are a lot of these Motions for Continuances, and it's all very foreseeable, and I am not saying that that is, in fact, his only motivation, but, nonetheless, excluding that from all consideration and assuming that is not even according to what he was trying to do, that is, to avoid punishment for the crime that he has been found guilty of, Two counts of first degree murder, we're face [sic] with a situation where, in my opinion, you have all of the information available to you that you need to adequately prepare for sentencing. It is not as good as if you had sat here and watched the entire trial. That is one of the benefits of having the same lawyer represent you at sentencing who sat through the whole trial. That benefit has been given up by Mr. Lankford. I didn't force that upon him. Mr. Longeteig doesn't force it upon him, and you didn't force it upon him. He was aware of the consequences of his actions, and he'll have to suffer those consequences. I, however, do not think those consequences are going to be significant in that, as I said. I believe and I'll – and I will direct Mr. Longeteig to be at your beck and call from now until sentencing so that you have an adequate opportunity to ask him any questions in view of the fact that you indicated you had trouble contacting him previously, but, based upon my understanding of the Preliminary Hearing testimony and the trial testimony, I certainly believe the review of those matters plus review of the testimony of Mr. Lankford that you already have will adequately prepare you for sentencing and, also, as I indicated, we hope that you will be able to review actual tapes of what

occurred, in the event that you have some question in your mind that there may be additional material that you want to review, or at least verify. So, for those reasons, the Motion for a Typewritten Transcript will be denied. Specifically, I might mention, too, that the preparation of these transcripts would ultimately result in a continuance of the sentencing, which is now set for the 12th, two days from now – or one and a half business days from now. You may proceed to your next Motion.

MS. FISHER: Thank you, your Honor. Next Motion which I'd like to bring to the Court's attention is th Motion for Continuance of the Motion for New Trial and the sentencing. I have file an affidavit in support of that Motion for Continuance. For the Court's benefit, I'll go over it basically. I was appointed on September 20th, 1984, to represent Bryan Longeteig (sic) on his Motion to have a new attorney – Lankford. I'm sorry.

THE COURT: Pardon me. Could you say that again?

MS. FISHER: I referred to him as Bryan Longeteig, your Honor.

THE COURT: No, no. The substance of the conversation. Could you read back what she just said?

(The requested portion was read back by the Court Reporter.)

THE COURT: Thank you.

MS. FISHER: May I continue, your Honor? Prior to the –

THE COURT: Well, the record wouldn't really reflect that you were appointed as a new attorney. An additional attorney.

MS. FISHER: Correct, your Honor.

THE COURT: All right.

MS. FISHER: On Mr. Lankford's Motion for a New Attorney is what I mean to say. That prior to September 20th, 1984, I had no association with this case, and, consequently, no personal knowledge that a case had been before this Court for approximately a little over 11 months at that time. It's my opinion that I cannot adequately or effectively represent my client without time to review the transcripts, to review the tapes, to talk with Mr. Longeteig, to ascertain whether or not there are additional witnesses, and, in fact, I believe that there are additonal [sic] witnesses that I have not yet been able to put into a position where I can bring them up for either the Motion for New Trial or the Motion for Continuance. Three of the witnesses that I listed are Robert Lankford, Colleen Lankford, and Gretta Maurer. It is my understanding that each of those persons have knowledge that would be relevant, both to the Motion for New Trial and to the sentencing, and that their testimony would not be cumulative in that they can testify to independent facts. I have talked with Gretta Maurer, and I did previously file a Motion for Continuance, basically, on her inability to attend sentencing on October 12th. In speaking with her, she advised me that when she was physically able, she was willing and ready to come to Idaho and testify –

THE COURT: Is that his mother?

MS. FISHER: Yes, your Honor – my client's behalf without going into the – well, actually, you know, her testimony basically would be was that she knows Bryan and Mark because she is mother to both of them, that she has known them since they were born, that she knows their relationship, that their relationship is such that Mark is violent, Mark is mean, Mark is a threat to society, Mark has threatened to kill her on occasion, Mark has threatened her sons on occasion, that she is afraid of Mark, that everyone in her family is afraid of Mark, that Bryan is afraid of Mark, was afraid of Mark, and has continued to be afraid of Mark, due to the type of relationship that existed in that family. Her testimony as to my client would be that Mr. Lankford was a peaceful person, that the only –

THE COURT: Mr. who?

MS. FISHER: Bryan Lankford was a peaceful person, that the only time she knew of him being in trouble was when Mark was influencing him, that Mark had the capability to influence him and to influence other members of the family, that Bryan is not a threat to society, that Bryan is not a dangerous person, that Bryan has never acted violently in all the time that she has known him, that Bryan has, in fact, been very supportive of her and has been what every mother wants for a son. Those were not her exact words. Consequently, you know, her testimony is relevant and material to the sentencing, obviously. Secondly, she would testify that she had never been contacted by Mr. Longeteig and that I believe that her testimony, given the relationship of Mark and Bryan, would be supportive of Mr. Bryan Lankford's testimony at trial. She would have been a material and relevant

witness that should have been called to trial, and, consequently, the fact that Mr. Longeteig never contacted her to even discover whether or not she was an important witness would be supportive of my Motion for New Trial on the basis of ineffective assistance of counsel. I have attached to my affidavit a summary of the investigation and preparation that I had done in this case. I have talked with my client on an average of every other day for several hours a day. I have attempted to review the court file, to read the preliminary transcript, to talk with all of the parties involved in the case, to talk with the witnesses that were – that I discovered in the course of going through the court's file or going through – or talking with my client. I don't think that my Motion for Continuance is based on any ploy by the defendant, but it's simply based on the fact that, unless I have the opportunity to subpoena Gretta Maurer and to determine whether or not there are additional witnesses that are material or relevant to Mr. Lankford's Motion for New Trial and sentencing, then I can't effectively represent him. For those reasons, I'd ask for a continuance and, also, on the basis of the Motion for Transcript which has been denied. That was part of my Motion for Continuance was that, given the time necessary to type up the transcript, I would need a continuance in order to look at the transcript and go from there.

THE COURT: What's the State's position?

MR. ALBERS: Again, we resist, your Honor. We think that there has been an adequate opportunity to make the arrangements to have that king [sic] of testimony at Bryan Lankford's sentencing. That's already passed. That opportunity has come and gone. They knew

when the sentencing was, and it hasn't – didn't get accomplished. I think, however, the same information, in the sense of fairness, can be produced by witnesses that are going to be here. Mr. Ralmuto is here. The grandmother, Mrs. Rowell, is going to be here tomorrow, and I was going to, myself, have Gretchen Maurer come, but her doctor himself told me that she should not, and I spoke with the doctor, and, then, after that information was available, the grandmother consented to come because she says she knows, basically, the same kinds of things. I think the testimony would be cumulative, then, of the grandmother and the mother. For that reason, the grandmother is going to be here, and I have made arrangements to have her here for both sentencings. They're cumulative, and other people can testify as to the same things. As counsel just mentioned she wanted to do, I think she can do that with the grandmother just as readily as the mother. So the opportunity was there, and I think we're all prepared.

THE COURT: Have you done any preparation for sentencing?

MR. ALBERS: Yes.

THE COURT: Have you called people?

MR. ALBERS: Yes.

THE COURT: Have you subpoenaed people?

MR. ALBERS: Yes.

THE COURT: Have they traveled here?

MR. ALBERS: Yes.

THE COURT: What's the nature of the situation?

MR. ALBERS: Mr. Ralmuto is here. He traveled from San Antonio, and Mrs. Rowell will be here tomorrow from Houston.

THE COURT: The State has gone through expense?

MR. ALBERS: I was informed by Gretchen Mauer's doctor personally. I talked with him. I don't know whether that's changed that she couldn't be here.

MS. FISHER: If I could, your Honor. I did have a conversation with her doctor, and he said that she would be physically able to travel within four weeks.

THE COURT: That was his feeling when?

MS. FISHER: The date of my conversation would be in my affidavit in support of the First Motion for Continuance.

THE COURT: Been a few days ago; is that right?

MS. FISHER: No, your Honor, it would be approximately a week ago. Yeah. Maybe a week and a half ago. The other thing that I would like to state your Honor: I am fully aware that people have traveled at great expense, both to the State and to themselves, to come here for Mr. Lankford's sentencing, and I am adjoined with the Prosecutor that I don't want these people – because we do have witnesses that we have been able to get up here, I don't want these people to have to go home and come back. I don't have any objection to having evidence heard on both the Motion for New Trial and the sentencing from these witnesses that have traveled as far as they have to come and testify. What I'm asking is that

we have that testimony and, then, I be given an opportunity to continue the Hearing, that the Court not make a ruling until I've had time to bring Gretta Maurer to continue my investigation in regards to Robert and Colleen Lankford. I believe the other witness that I have not yet been able to locate would be Mr. Lankford's probation officer.

THE COURT: Obviously, we're in a situation, though, counsel, that in the event the State would properly prepare for sentencing and you brought witnesses back, he's got to be prepared to rebutt those witnesses, and if those witnesses have to be rebutted in Texas, we go through the same process once again by another continuance so he can bring his witnesses again, at the State's expense, up here. That's the advantage, of course, of having a Hearing at one time.

MS. FISHER: I agree with that, your Honor. The only thing I would like the record to reflect is that on September 20th, 1984, when I moved into this case, no witnesses had been contacted, so no preparation had been made for sentencing at that point, though they could have been subponeaed [sic], and Mr. Albers says the time has come, and I want to contact these people to determine whether or not their testimony would [sic] material and relevant. I wasn't in a position to subpoena them.

THE COURT: Well, obviously, I don't know that that necessarily is the case. For instance, do you intend to have Mr. Ralmuto testify in mitigation at Mr. Lankford's Hearing?

MS. FISHER: Yes, I do, your Honor.

THE COURT: Was there made arrangements to have him present at the sentence of Mr. Bryan Lankford before you came on board?

MS. FISHER: As far as I know, Mr. Albers made those arrangements.

THE COURT: Had Mr. Longeteig, after your discussions with him, intended to call Mr. Ralmuto in mitigation?

MS. FISHER: I don't know, your Honor. I mean we had a brief discussion on sentencing.

THE COURT: Had you, Mr. Longeteig?

MR. LONGETEIG: Yes, I did, your Honor.

THE COURT: Did you know that he was, in fact, going to be present?

MR. LONGETEIG: Yes, I was informed by Mr. Albers that the State was bringing him up, so I saw no reason to subpoena him twice.

THE COURT: All right. Well, let's deal with this, if you don't mind, one aspect at a time. We have a Motion to continue the Hearing for a new trial?

MS. FISHER: That's correct, your Honor.

THE COURT: Okay. You have a Motion for a New Trial?

MS. FISHER: That's correct.

THE COURT: And you want to continue the Hearing on that. Now, why specifically do you wish to continue that?

MS. FISHER: The two major reasons why I would like a continuance on the Motion for New Trial are, one, for the typewritten transcript. Because of the nature of the Motion for New Trial, I don't believe that the memories of the parties involved in the case are sufficient to enable me to prepare and investigate that Motion for New Trial. Second reason is: The witnesses that I have thus far discovered and attempted to investigate would all be material to my Motion for New Trial because none of these witnesses had ever been contacted before, and so every witness that's material and relevant that's not been contacted, I think, is relevant to the Motion for New Trial as to whether Mr. Lankford had effective assistance of counsel prior to trial.

THE COURT: Okay. Now, basically, your Motion for New Trial –

MS. FISHER: If I could, your Honor, there is one other matter –

THE COURT: Yes.

MS. FISHER: – in my affidavit in support of a Motion that I think a number of those Motions would go to the Motion – I mean a number of those statements would go to the Motion for New Trial, and that's the time to research the issues involved. I've done my best. I have a working knowledge, probably, of each issue involved, but I don't have a full and complete knowledge. I think because of the number of issues and the complexity of the case, I have had insufficient time to properly research that so I can present Mr. Lankford's position to the Court appropriately.

THE COURT: Okay. Now, what you're saying with reference to your Motion for New Trial is that Mr. Longeteig didn't adequately defend Mr. Bryan Lankford?

MS. FISHER: That's correct, your Honor.

THE COURT: And, therefore, he wants a new trial?

MS. FISHER: That's correct, your Honor.

THE COURT: And would you agree that that matter can be raised post-sentencing or by way of appeal by way of Post-Conviction Plea?

MS. FISHER: Your Honor, I would agree that it could be, had Mr. Longeteig represented Mr. Lankford through the sentencing. I don't know that when I was appointed on September 20th, 1984, that that wasn't the time. Based on my investigation, that I think now is the appropriate time to raise that issue. Now, what effect that has on the post-conviction – obviously, I don't want to be in a position of saying that counsel was ineffective when I was counsel for two months, and so I think that now is the time that I have to raise that issue and not post-conviction.

THE COURT: Again, we're faced with a situation where any individual who is facing sentencing, immediately prior to sentencing, can discharge counsel, get a new lawyer, and have his lawyer claim that the first lawyer was inadequate, then request a Motion for New Trial, but because he's requesting a Motion, you've got to get a number of witnesses, etcetra [sic], etcetra, [sic], which is going to mandate a continuance of the sentencing. Then I continue the sentencing until December 1, 1984. Then he gets another lawyer saying that you did a

bad job. In essence, we go on and on and on, and the individual would never get sentenced. So that is naturally a problem that the Court has to deal with: One of weeding out frivolous complaints about lawyers when those complaints are aimed at securing nothing but a continuance, as opposed to a sincere effort to grant a – get a continuance so the evidence can be presented. Now, a granting of your Motion for a New Trial or a continuance of your Motion for a New Trial would, obviously, continue the sentencing, and I'm not prepared to do that, and as a consequence, I'll have you proceed on your Motion for New Trial at this time.

* * *

[EXCERPT FROM TESTIMONY OF WILFRED W. LONGETEIG AT DEFENDANT'S MOTION FOR NEW TRIAL HELD THE 10TH DAY OF OCTOBER, 1984.]

[TRANSCRIPT PAGES 73, 75, 98, 99-102, 105-110, 114-116]

[MS. FISHER]

* * *

Q Be fair to say that Mr. Lankford was charged under the robbery murder – or felony murder principle; isn't that correct?

[MR. LONGETIEG]

A Yes.

Q So that the issue of intent actually goes to the first felony and not to the murder; is that correct?

A Right.

* * *

Q Had you talked to Bryan's mother about the relationship between Mark and Bryan?

A My client prohibited me from contacting his mother.

Q Had you talked to Judy Risinger about the relationship between Mark and Bryan?

A No.

Q Had you talked with Margaret Case about the relationship between Mark and Bryan?

A No.

Q What family members had you contacted?

A Didn't talk to any of them.

Q Wouldn't it be fair to say that the family members of Bryan Lankford and Mark Lankford might be able to shed some light onto whether or not the relationship between Mark and Bryan was such as to raise the issue of coersion [sic] and duress as a defense?

A I felt that I had adequate information without talking to all those people.

Q So that I understand it –

A And I find out later that they say the same thing I already knew, so –

* * *

Q Mr. Longeteig, did you understand that Bryan Lankford faced a possible death penalty?

A Yes. I read the statute, Ms. Fisher.

* * *

BY MS. FISHER:

Q But you didn't present a number of things that could have been presented; is that correct?

A No, because it would have messed up the orderliness of the case.

Q Because you had decided it was not worth the effort?

A I decided that it would be detrimental.

Q Do you know on how many occasions Bryan Lankford indicated dissatisfaction with your representation prior to going to trial?

A No, I really don't recall any specific instances prior to trial.

Q Is it your testimony that Bryan Lankford was satisfied with your representation until after trial?

A To the best of my recollection, and any inner thoughts, I don't know, but I don't recall him asking – you know, giving me a hard time or asking me to step down or anything else until after the trial was over.

Q If the minutes reflected that he came into court on the basis of his complaints of your representation prior to trial, you would agree that it had occurred?

A Yeah, I'd say that I – I was thinking that this was all after trial, but if the minutes reflect that, I'm sure they're right.

Q Did you, during the course of your representation of Bryan Lankford, engaged in plea negotiations with Dennis Albers?

A Certainly.

Q When did you make the determination to enter into plea negotiations?

A I didn't make a determination. That's something I consider in every criminal case whether I do or not, but I consider it.

Q When did you make the decision to engage in plea negotiations in Bryan Lankford's case?

A Oh, I would imagine pretty much from the start. As soon as – you know, once I found out – I'd say at least after I read all the investigative reports and talked to Bryan and got a little bit of a grasp of the whole picture. I'm not so sure we didn't even discuss them right from the outset.

Q Is it your testimony, Mr. Longeteig, that Bryan Lankford was aware of your plea negotiations with Dennis Albers?

A He wasn't aware of every word that we exchanged because it took place out of his presence. He was aware that they were going on, was aware of the general progress or lack of progress, and he was – we talked about what would be our bottom line, what would be our opening offer, those sorts of things. When it finally fell through, he was aware when that happened and why it did and that we were going to trial.

Q Is it your testimony that Bryan Lankford consented to the plea negotiations?

A He certainly didn't voice any objections. In fact, as I was under the impression, he was all for it.

Q Is that just an impression that you had?

A Well, I'm sure that impression was gained by things he said, but I couldn't give you specific words.

Q So you don't recall the time in which Mr. Lankford advised you to go ahead and enter into plea negotiations?

A Of course not. We're talking about things over the course of the whole last year.

Q Would your log indicate the time in which you advised Mr. Lankford?

A No, I don't write things like that down.

Q Mr. Longeteig, in the course of your criminal experience, is it an unusual claim for attorneys to – excuse me – for clients to raise the issue of effectiveness of counsel?

A I only had it happen once before.

Q In regard to just general claims, not necessarily claims against you, but –

A Oh –

Q – is the claim of effectiveness of counsel an unusual claim?

A I'm sure the courts see it on somewhat frequent basis.

Q And in your experience as an attorney, you're aware of the necessity to produce a record that will protect you from claims of effectiveness of counsel; isn't that correct?

A I really don't concern myself that much protecting myself. I worry a little more about my client than I do myself.

Q Are you familiar with the American Bar Association's standards for defense functions?

A In a general way. I mean I have read them. Not recently.

Q When was the last time you read them?

A I don't know.

Q Did you and Mr. Lankford have any disputes as to the method in which you were proceeding at trial?

A Yeah, he didn't always want to de everything that we were doing. Some things that I wanted to do, we didn't do, but some of the things that we ended up doing, I, frankly, had to talk him into.

* * *

Q In the times in which you discussed matters with Bryan Lankford in regard to the plea negotiations, isn't it true that Bryan Lankford did not want to testify?

A He would rather not, yes, that's very true.

Q And isn't it true that the manner in which you caused him to testify was by indicating to him that the penalty which would result would be much stiffer if he did not testify?

A I never once said they would be. I said that, "We've adopted this strategy. Let's go through to the end. Let's not mess it up now. Let's be consistent, and it can only be to your best benefit." I think I said that – perhaps I said the penalties could be stiffer. I mean any judge sentencing a defendant, if he's going to look at cooperativeness and candor, which would, for one thing, indicate rehabilitative potential, and I certainly did urge him repeatedly that, "We're on this roll, let's go with it. Let's not stop now. Why mess up the program?"

Q And he was resistant to that; was he not?

A He didn't – he wasn't worried about testifying as such, but he didn't – just the unpleasantness of it and the

fact that – well, I think he stated it several times: "Even though Mark did all these things, caused me to get into these things," he said, "He's my brother. I hate to do it." He said, "It's hard for me to do it," and I can understand it.

Q What were the penalties that were available to Mr. Lankford at that time?

A Death. Twice.

Q Would it be fair to say that when you advised him if he didn't testify, the Court could be harder on him, that it would be reasonable for Bryan Lankford to assume that you were talking about the death penalty?

A He knew the full range of penalties, and I don't – I told him to – I don't think it was reasonable for him to assume the death penalty because under *Hinman versus Florida*, that was one of the aims of the trial is to establish a factual basis that we could preclude a death penalty because of *Hinman versus Florida*. So I told him from the start I didn't see a very realistic possibility of a death penalty, but we were very concerned with a fixed term life as opposed to something else.

Q So it's your testimony that you told Mr. Lankford that he wouldn't get the death penalty?

A Yes.

Q Event if he didn't testify?

A Right. As far as –

Q Based on your understanding of the –

A As far as testifying at Mark's trial, I think it probably was important, under the aim of the Hinman Doctrine, that he testified in his own behalf because I wanted to establish a record in his own trial that – that would survive appellate review, if necessary that there was not sufficient evidence to show that he was a trigger man so to speak, but as far as Mark's trial, I think once Bryan's trial was over, I felt that we had satisfied that – that record, and we basically had won that point.

Q Did you and Mr. Albers reach a plea agreement?

A Nope. Well, actually, yeah. We did, but the reason it was never carried through is one of the conditions that Bryan and I had laid down, is that we would have to have the stamp of approval and a prior commitment from the Judge. The Court declined to give that commitment, and so we didn't go through with it any further. Dennis and I both were to the point that, had the Judge approved, we were – we were agreed on it and Bryan was, also.

Q When did you tell Bryan about the plea agreement?

A Which plea agreement?

Q How many plea agreements did you come to?

A Well, there was – okay. As far as the agreement where the Prosecutor and I ended up, I suppose I told him about it whenever we came to it. I don't – well, let's see. I can give you some rough dates. The reason I remember it is we got down to the nitty-gritty, talked to the Judge, laid it – the whole thing before him in chambers, said that, "It's essential to have your concurrence on this and your commitment before it will work." The

Judge said he would think it over, and I recall Mr. Albers telephoning me in Moscow in Federal Court when I was up there in the middle of a trial because I remember going back and telling my client up there and says, "Well, looks like we're going to trial on the Lankford case. I just got word that the Judge has declined to commit himself." And that was – that trial in Moscow started the 27th of February and continued all that week into the 2nd of March. It was sometime during that week that – and I think it was – I was staying in Moscow. I think when I got home the following week is when I told Bryan, "The deal's off," and we were going to trial.

Q So it's your testimony that you reached a plea agreement sometime in February?

A Yeah. There had been negotiations going on on [sic] and off for months before that, but I know it was in February when we presented it to the Court.

Q How long had you been engaged in plea negotiations?

A On a continuous basis? Oh, I think we'd been kicking it around ever since the case started.

Q Would it be fair to say – well, when did you think that you would reach a plea agreement?

A I felt that I had a lot of hopes clear up until the last week of February that, eventually, we'd get one.

Q Based on those hopes, did you pursue plea agreements rather than investigate the case?

A No, we – I always operate on the basis that we may not get there and we'll have to try the case, but I

don't think anything is neglected because of that. I will say that, you know there was more intensive after that date than there was before because – well, that's the way most people try cases is that as close as the time goes, the more intensive your effort gets.

* * *

Q Would it surprise you in the minutes in April that the Court had advised you that funds would be available to bring witnesses up for sentencing?

A Yes, but in a general way, that didn't surprise me, no.

Q So you never pursued that?

A Well, you got to remember that there was a time period there that Bryan was, in effect, incommunicado. I mean I could talk to him, but all he was willing to talk about was some extraneous problems. Would not talk about sentencing.

Q But you had the information prior to even going to trial, didn't you?

A Yes, but we didn't have a sentencing date.

Q And so, basically, you wanted to wait until there was a sentencing date before you even found out if these witnesses were worth talking to?

A I didn't see any magic in whether I did it this week or next week.

Q Did you talk – did you make any Motions to the court for funds for investigation in this case?

A At what time period?

Q At any time period?

A No.

Q Did you make any motions to the court for funds for expert witnesses in this case?

A No.

Q Were you ever denied any funds?

A Not directly. The only thing I can say is that when we're talking about how to proceed with the witnesses on sentencing, that was still in the negotation [sic] stage. It was hinted by the Court that we ought to explore some alternatives and we might have to make formal motion for some funds, but, no, not really. There was never a motion made or a request made that we were denied.

Q Would it be fair to say, basically, what you were advised by the Court was make a motion?

A Yes.

Q Did you ever make that motion?

A We hadn't – hadn't finalized a decision between Bryan when you came into the case, no, so therefore, it wasn't made. Part of it, of course, was taken care of because I was in contact with Mr. Albers and he advised me of who he was bringing up here on his expense, and that took care of about half of our needs, anyway.

Q When you're representing a criminal defendant in a first degree murder case, especially of the nature of the type of murder that this involves, I mean you'll agree that the Lankford case, the murder is offensive; it's pretty brutal?

A Any murder is offensive.

Q But this one is particularly brutal; wouldn't you agree with that?

A Oh, I don't know that – Okay. I'll agree with you for whatever it means. It was bad, yes.

* * *

[EXCERPT FROM TESTIMONY OF BRYAN STUART LANKFORD AT PETITIONER'S MOTION FOR NEW TRIAL HELD OCTOBER 10, 1984]

[TRANSCRIPT PAGES 173-174]

* * *

[MS. FISHER] Q Mr. Longeteig ever advise you of the necessity of testifying?

[MR. LANKFORD] A Of the necessity?

Q Uh-huh.

A Of testifying?

Q Yeah. Did he ever tell you you had to testify?

A Well, not in so many words, but he told me that he felt, and he had been told – apparently, he had talked to Mr. Albers and the Judge. All in all, it was either I did, and if I didn't, it was going to be harder on the sentencing.

Q What did you understand about his statement?

MR. ALBERS: Your Honor, could we have a foundation as to what time? Sounds like this is talking about Mark's trial.

THE COURT: Yes.

BY MS. FISHER:

Q What time are you referring to?

A Well, I'm referring to Mark's trial.

Q Did he every indicate to you – what did you understand from his statement?

A It was my understanding that I was – you know, if I did it, I would get immunity from any other crimes that may or may not have been committed. I would be

taken to Texas, and if I didn't, it was just going to be a lot harder on me at sentencing.

Q And how would it be harder on you, Bryan?

A Well, he kind of left that up just to be -- you had to read into it. You know, I knew exactly what he meant.

Q What did you read into it?

A I read into it: If I went ahead and testified, I'd get indeterminate life. If I didn't, I'd probably get a fixed life. I believe that's the same way he felt, also.

MS. FISHER: I have no further questions, your Honor.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. ALBERS:

Q You did, in fact, get immunity; did you not?

A Yes, sir, I did.

Q And you were told that there were phone calls made to the Warden of the State Penitentiary System?

A Yes, sir.

Q And you were told that everything would be done that was possible to see that you were isolated from Mark and, hopefully, be in Texas?

A Yes, sir, that is exactly correct, and I wish they would have completed that, but they didn't.

* * *

[EXCERPT FROM COLLOQUY OF COURT AT PETITIONER'S MOTION FOR NEW TRIAL HELD OCTOBER 10, 1984]

[TRANCRIPT [sic] PAGE 206]

* * *

[COURT] A considerable comment was made about the fact that Mr. Longeteig did not get approval of his client to enter into plea negotiations. Now, I personally see nothing wrong with anything that Mr. Longeteig did with reference to plea negotiations. He said that he immediately looked at the possibility of entering into negotiations after discussing the matter with his client, and, perhaps this would be a very wise thing to do in view of the fact that there were two individuals charged with crime. Quite often, there is a race to the Prosecutor to get the best deal before the other counsel does it. The point of it all is that Mr. Longeteig and Mr. Albers, as indicated by the record, approached this Court and asked me to guarantee that Mr. Lankford would be guaranteed possibility of parole in ten years if he plead guilty to two counts of first degree murder. This Court rejected that. The situation is: No harm, no foul. There was no harm in Mr. Longeteig attempting to secure that promise by this Court through Mr. Albers because I did not accept it and that particular arrangement was not entered into.

* * *

[EXCERPT FROM COLLOQUY OF COURT REGARDING DEFENDANT'S MOTION FOR CONTINUANCE FOR TIME TO PROCURE WITNESS HELD OCTOBER 10, 1984]

[TRANSCRIPT PAGES 210-211]

* * *

THE COURT: It's my understanding, counsel, that you feel that you already argued to me your Motion for Continuance because you want Gretta Maurer to be up here.

MS. FISHER: That's right, your Honor.

THE COURT: I want to make it clear, for the record, that that Motion will be denied. Certainly, from what you've told me – you may be seated, Mr. Lankford. From what you've told me, Gretta Maurer is going to testify that Mark is nice and – Bryan is nice and Mark – I have to review my notes – and nonviolent, that's the basis, and Mark is the opposite. This particular testimony certainly would be cumulative, and I'm not in a position to wait until she feels better. We don't know how long it's going to be. All we know is that she's too ill to come up now and, certainly, if we wait for her, four weeks from now, maybe the two that are here will be sick and/or abed or something worse. The testimony that you're telling me that you want to bring in through the mother certainly is cumulative again. I think Mr. Albers – and you can correct me if I'm wrong. Mr. Albers has indicated and always has indicated that he would be willing to have that particular evidence come in by way of affidavit and wouldn't object to that.

MR. ALBERS: That's correct. I think that's already in the Presentence.

THE COURT: And that was agreed to between you and Mr. Longeteig at some other earlier time; is that correct?

MR. ALBERS: Yes.

THE COURT: The Motion for a Continuance to Call –

MR. ALBERS: Gretchen Maurer.

THE COURT: – Gretchen Maurer is denied. Sentencing will be continued as scheduled. We'll be in recess.

(WHEREUPON THE HEARING WAS CONCLUDED AT 10:22 O'CLOCK P.M.)

[EXCERPT FROM COLLOQUY OF COURT AND COUNSEL RE: PETITIONER'S TESTIMONY AT CO-DEFENDANT'S MOTION FOR NEW TRIAL HELD OCTOBER 11, 1984]

[TRANSCRIPT PAGES 8-15]

* * *

MS. FISHER: At this time, your Honor, I would advise my client not to testify.

THE COURT: On what grounds?

MS. FISHER: Grounds of the Fifth Amendment.

THE COURT: Now, would you please be specific in your argument?

MS. FISHER: Yes, your Honor. This line of questioning goes directly to the statements made by my client in regard to a criminal offense for which he has faced charges and is presently still facing charges, and anything that he says in this regard would be taken as testimony on those matters, and I've advised him not to testify as to any matters concerning the offense or statements made in regard thereto.

THE COURT: Okay. What is your line of questioning, Mr. Fitzmaurice?

MR. FITZMAURICE: Your Honor, in essence, I'll make an offer of proof as to what the testimony would elicit, your Honor. The testimony would elicit that on the 22nd day of June, 1984, that Mr. Bryan Lankford contacted the *Lewiston Tribune* from the Idaho County Jail by telephone, that he called on two separate occasions asking for Kathy Hedberg of the Lewiston Tribune Office, that he, then, came in contact with Mr. John Killen, Editor

for the *Lewiston Tribune*, and that after talking to Mr. Killen, he related certain information concerning his prior testimony in the case of Mark Lankford and concerning the circumstances surrounding the deaths of Bryan – excuse me – of Mr. Bravence and Cheryl Bravence, and, in essence, stated that he had lied under oath when he stated that Mark had been the perpetrator of the acts. He also stated that his confession or his statements had been coerced by the Prosecuting Attorney's Office. He further stated that he had not been in contact with Mr. Mark Lankford and that Mr. Lankford had not coerced him in making the statment [sic] to the *Tribune*. In essence, your Honor, it would be much more detailed than that, but basically, that's the gist of it.

THE COURT: Thank you. Now, Mrs. – or Ms. Fisher, is it your position that, in the event your client gave false testimony at trial, that he would be subject to perjury charges? Is that the –

MS. FISHER: Well, your Honor, that's my understanding of the law, but it's not my position that that would result. My position is that Mr. Lankford, at this time, has been advised by me not to testify to any matters regarding the offense for which he's been convicted. That's my understanding of the perjury law, certainly, but that's not the basis of the Fifth Amendment. The Fifth Amendment goes to the offense itself for which he stands charged for the murder.

THE COURT: Well, certainly, Mr. Lankford has given testimony at trial and he can be asked whether or not be called the *Tribune* and made those statements and

whether or not those statements were true, and, obviously, if he were to – if his testimony would be that he did contact the *Tribune*, then whatever – that might lead to a possible perjury charge, and I can understand that because let me say, for example, if next month someone finds out that there was an eye witness to the incident in question and that eye witness would relate that he observed the incident occur exactly as Mr. Lankford had allegedly reported to the *Tribune*, then the fact that he had contacted the *Tribune* and related that story would be used as evidence against him in a perjury trial, and so your objection is well taken in that regard. However, if he is asked whether or not – and furthermore, if he is asked whether or not he told the truth at the trial, and that answer would be "Yes," in that event, that would not incriminate him with reference to perjury. What you're saying to me is, as I understand it, that you feel that he has the right not to testify concerning his testimony at trial, even if it is consistent with his testimony at trial because you are, as I understand it, afraid or fearful that that testimony might, then, waive any future claim that he has which would have protected – which would protect his right, if that statement was coerced at trial. Is that correct?

MS. FISHER: That's correct, your Honor.

THE COURT: All right. Now, with reference to that latter position, Mr. Lankford will not be giving up any rights that he has to claim the testimony that he gave at trial was coerced, and he will – if that was the only objection, I would order him to testify, and you have made your objection and you have preserved your record. Thus, if, in the event he is asked whether or not

he told the truth at trial and he answers, "Yes, I did tell the truth at trial," then the fact that he said that today will, in no way, jeopardize his rights to claim that the testimony he gave at trial was coerced. Certainly, because, number one, I would order him to do it, and number two, you've made your objection fully for the record and you've done everything you can. However, I'm not in a position to let him testify at this point in time because there's a possibility that perjury charges may result. So, based upon that ground and that ground only, I am not going to coerce Mr. Lankford to testify.

MS. FISHER: May I respond, your Honor? On the grounds of his prior statements of testimony, I would also like the assurance that we're not waiving it for grounds other than mere coercion.

THE COURT: I understand that.

MS. FISHER: For any grounds whatsoever, such as those grounds that have been alleged for Motion for New Trial.

THE COURT: Or any other grounds that you haven't alleged, as far as I'm concerned. Do you understand the nature of my ruling?

MS. FISHER: Yes, I do, your Honor.

THE COURT: Mr. Albers.

MR. ALBERS: Your Honor, perhaps we need a brief recess at this point in time.

THE COURT: That would be appropriate. I'll meet with counsel in my office.

(There was a short recess.)

THE COURT: We're on the record. The parties announced previously are present in court. It is my understand [sic], Mr. Albers, that you have a request that you would like to make to me at this time.

MR. ALBERS: Yes, your Honor. There is a theoretical possibility, I suppose, that perjury charges relating out of this particular day's testimony could, perhaps, at some time be filed, depending on what the testimony is, of course; and, to any extent necessary, I would ask the Court – apply to the Court for a grant of immunity in relation to any possible perjury charges that could be filed based on today's testimony of Mr. Bryan Lankford, that it would not be used for further prosecution of perjury.

THE COURT: Ms. Fisher, is that your understanding?

MS. FISHER: It was my understanding that there would be a general immunity of perjury charges. I guess my difficulty is the perjury charges that could result theoretically from trial, as well, that result from his testimony here today.

MR. ALBERS: That's already been done at the previous immunity grant. I would agree, even to that extent, to apply to the Court for immunity from future perjury prosecution relating from previous testimony this witness has given or the evidence today.

MS. FISHER: And it was also my understanding that this testimony would be used for purposes of Mark Lankford's Motion for New Trial and for no other purpose.

MR. ALBERS: Yes, that is implicit to what the Court earlier came to.

THE COURT: I'll accept that proposed agreement.

* * *

IN THE DISTRICT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

COURT MINUTES

The Honorable George Reinhardt
District Judge Presiding

Lorri Schmidt
Reporter Tape Reading

Starla Allen
Clerk

___ Term 19 ___

Friday, October 12, 1984 at 9:49 a.m.
Judicial Day, Date, Time

Grangeville Idaho
Place

STATE OF IDAHO, Plaintiff	)	Docket No. 20157
vs.	)	APPEARANCES: Dennis L. Albers For Plaintiff
BRYAN STUART LANKFORD, Defendant	)	Joan Fisher For Defendant

Subject of Proceeding: Sentencing

BE IT KNOWN, that the following proceedings were had, to-wit:

The Defendant is present in the courtroom.
Mr. Wilfrid Longeteig is present in the back of the courtroom.

Fisher re-urger [sic] her motion for a continuance.
Court denies the motion.

Margaret Rowell is sworn and testifies.
Fisher direct examination.

Albers cross examination.
Fisher re-direct examination.
Witness is excused.

Margaret Case is sworn and testifies.
Fisher direct examination.

Albers requests that this witness be ordered to remain for the sentencing hearing of Mark Lankford. Fisher objects. Court grants the request and order Ms. Case to be here on October 15, 1984 at 9 a.m.

Mary Lankford is sworn and testifies.
Fisher direct examination.
Albers cross examination.

Ablers requests that this witness be ordered to remain for the sentencing hearing of Mark Lankford. Fisher objects. Court grants the request and order Ms. Lankford to be here on October 15, 1984 at 9 a.m.

Judy Reisinger is sworn and testifies.
Fisher direct examination.
Albers cross examination.
Witness is excused.

/s/ Starla Allen
Deputy Clerk

Minute Book No. 10, Page No. 1 APPROVED:

/s/ (ILLEGIBLE)
District Judge

___ Term, 19 ___ Friday, October 12, 1984 at 9:49 a.m. Judicial Day, and Date State of Idaho, Plaintiff vs. Bryan Lankford Defendant Docket: # 20157 Subject of Proceeding: Sentencing Recess: 11:15 a.m. Reconvened: 11:39 a.m.

All parties previously announced are present.

Roy Ralmuto is sworn and testifies.
Fisher direct examination.
Albers cross examination.
Witness resumes his seat.

Recess: 12:15 p.m. Reconvened: 1:34 p.m.

All parties previously announced are present.

Dr. Michael E. Estess is sworn and testifies.
Fisher direct examination.
Albers cross examination.
Fisher re-direct examination.
Albers re-cross examination.

States Exhibit #1 – Report dated August 14, 1984 by Dr. Estess for Bryan Lankford – is marked and admitted in evidence.

States Exhibit #2 – Report dated August 27, 1984 by Dr. Estess for Bryan Lankford – is marked and admitted in evidence.

Court questions Dr. Estess.
Fisher objects to the Court questioning the witness. Overruled.
Witness is excused.

Ron Jones is sworn and testifies.
Fisher direct and examination.
Witness is excused.

Recess: 2:07 p.m. Reconvened: 3:06 p.m.

All parties previously announced are present.

Albers argues in aggravation.
Fisher argues in mitigation.

Court takes matter under consideration until October 15, 1984.

Fisher objects to the continuance.
Recess: 3:48 p.m. Reconvened: 9:30 p.m. on 10/15/84

All parties previously announced are present.

Counsel advise that they have received copies of the presentence reports in both this case and Mark Lankford's case.

Fisher speaks in regard to the presentence report.

Minute Book No. 10 Page No: 2 Approved:

/s/ (illegible)
District Judge

___ Term, 19 ___ Monday, October 15, 1984 at 9:30 p.m. Judicial Day, and Date State of Idaho, Plaintiff vs. Bryan Lankford Defendant Docket # 20157 Subject of Proceeding: Sentencing Lankford advises that he does not wish to say anything on his own behalf.

Defendant's #1 – Immunity Agreement – is marked.
Fisher argues on behalf of the exhibit.
Albers argues against the exhibit.
Fisher argues further.

Defendant's #1 – admitted in evidence.

Court reads findings and pronounces the following sentence: death penalty.

Defendant remanded to the custody of the Idaho County Sheriff's Department.

Recess: 9:57 p.m.

Minute Book No. 10 Page No: 3 Approved:

/s/ (illegible)
District Judge

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF IDAHO, COUNTY OF IDAHO

[EXCERPT FROM MOTION FOR CONTINUANCE OF S) "ENCING RE-URGED ON OCTOBER 12, 1984]

[TRANSCRIPT PAGES 214-215]

(Caption Omitted In Printing)

* * *

THE COURT: Be seated, please.

For the record, this is 20157, *State of Idaho versus Bryan Lankford*. The record would reflect that the defendant is present in court with counsel, Ms. Fisher, and the record would further reflect that Mr. Longeteig is present in court. The record would also reflect that Mr. Albers, the Prosecuting attorney is present in court. This is the time and place set for sentencing. Are there any preliminary matters from the State?

MR. ALBERS: No, your Honor.

THE COURT: From the defense?

MS. FISHER: Yes, your Honor? At this time, I will reurge my Motion for Continuance on the basis of failure to have a prepared transcript. I did receive the tapes of the trial transcript early yesterday morning. I was unable, due to preparation on other matters, to listen to those tapes, and consequently, I'm in a position of going forward on sentencing without knowing exactly what the Court is considering during the sentencing, and I'd ask for a continuance on those grounds.

THE COURT: Well, as indicated earlier, I'm considering the evidence that was received at trial, and that

particular evidence is also contained in the Preliminary Hearing transcript, which you have access to, correct?

MS. FISHER: That's correct, your Honor.

THE COURT: And Mr. Longeteig is available in court to aid you in your – any questions that you might have concerning that evidence. It's my feeling, and, again, I will reiterate this, that the factors which have resulted in your coming on board at this particular stage were brought about by Mr. Bryan Stuart Lankford in effort to delay these proceedings, and I feel, furthermore, that a continuance will not provide you with any significant or additional information that you may need for sentencing. The Motion for Continuance will be denied. You may proceed.

* * *

[EXCERPT FROM ARGUMENT AT SENTENCING HELD OCTOBER 12, 1984]

[TRANSCRIPT PAGES 314-336]

* * *

THE COURT: Be seated, please. For the record, this is 20157, *State versus Bryan Lankford*. Mr. Lankford is present in court with counsel, Ms. Fisher, and the State's present through the Prosecutor, Mr. Albers. I, quite frankly, counsel, have no order in which I am going to insist you proceed. Counsel, would you like to go first or second?

MS. FISHER: I'll go second.

THE COURT: All right. Mr. Albers, you may proceed.

MR. ALBERS: May it please the Court, counsel. Since this case began, your Honor, and as the Court will – will know from the proceedings, it appeared to me that the less culpable of the two was Bryan Lankford. For that reason, I was willing to enter into plea negotiations and felt that that was proper. The statute provides, of course, that the Court can take into account the trial testimony, and in doing that, one can conclude, I think, what the original intention was was [sic] to steal a car to get out of Idaho. It obviously got grossly out of hand. The testimony indicates that Bryan and Mark had a discussion, which the other witnesses corroborate at the McAllister Campground, and that discussion ultimately led to the taking of the Bravences' van. Those things, all taken together, in my view and, apparently, in the jury's view, ultimately resulted in a death occurring as part of a robbery and makes Bryan guilty of murder in the first

degree. If it were not for the Felony Murder Rule, there would be a difficulty in the proof in this case and in the conviction of Bryan Lankford, but it was, and that was the law. Bryan does stand, then, convicted of two counts of first degree murder for his participation. I tend to generally believe the witnesses from Texas, the family members, and I have believed this for a long time: That Bryan has traditionally been a pretty good person, except when he's been around Mark. Those are the reasons, the bottom line, what his family says about him as to why he would not and I would not and did not earlier recommend the death penalty, as the Court required, to be a filed document. The question now becomes: What are the options left and what is the appropriate thing for the Prosecution to urge to recommend? Dr. Estes' testimony, which is the most telling of all today, indicates that Bryan is manipulative, and I think there is evidence strong throughout this record of that fact. The testimony, the changing, the contacting the paper. Quite frankly, that bothers me to a great degree. How does that square with what the family says about him? Quite honestly, I don't know. How do we protect society and punish him for the involvement that he did have? Seems that the answer lies, again, with Dr. Estes' testimony. That is, in the midpoint of life, age 35 upward, Bryan – or other people, people in general, males and females, change attitude and nature, and Dr. Estes' testimony further indicates that there's some rehabilitative potential in Bryan. I think, and not being – not knowing what Bryan Lankford would be like in ten years, that that is best – best left with the parole board, and the result in that instance would be an indeterminate life sentence. I think that would be, then, me

recommendation to the Court, leaving to the parole board the opportunity, during the period of incarceration and thereafter for as long as the parole board thought necessary, to keep him incarcerated. The Court may have additional flexibility, since in this case there are two counts in which the Court could take into – could sentence on and can sentence on. Whether that could be consecutive indeterminate and how the parole board would do that, again, I don't know, but that may give the Court the flexibility to take into account a predictable number of years of incarceration to put him at that new point in life and, yet, leave with the parole board the discretion at some time if he, in fact, changes, if they in their discretion after he has aged and matured can conclude that he could be out on a parole. The case has been traumatic to many, many people. The bottom line is what the family says about him, tempered by what the Doctor predicts, and I think the indeterminate life sentence could do that, giving to the parole board the discretion to keep him longer or to put him back in society at the time he reaches that midpoint in life. That would be recommendation, your Honor.

THE COURT: I don't understand your recommendation. Are you recommending concurrent indeterminate lifes or consecutive indeterminate lifes?

MR. ALBERS: I'm recommending an indeterminate life sentence.

THE COURT: Concurrent? One's a minimum of ten years, and the other's a minimum of 20 years.

MR. ALBERS: If, in fact, they would be coupled in that fashion. I don't know whether they can be, your Honor.

THE COURT: Well, there's either – if they run consecutively, it's a minimum of 20 years.

MR. ALBERS: If the parole board would do that.

THE COURT: If they run concurrently, it's a minimum of ten years. What are you recommending? A minimum of ten years or a minimum of 20 years?

MR. ALBERS: I am torn, your Honor. I'm leaving that before the Court. I think there needs to be, though, the indeterminate discretion of the parole board of what the appropriate thing is in view of the heinousness of this crime. I'm not sure. I would leave that with the Court. Leave it in the Court.

THE COURT: So you're recommending somewhere between ten and 20 years?

MR. ALBERS: Basically, yes.

THE COURT: Thank you. You may proceed, counsel.

MS. FISHER: May it please the Court, Mr. Albers.

THE COURT: When I say, "You're recommending between ten and 20 years," you're recommending parole possibility at a period of time between ten and 20 years; is that correct?

MR. ALBERS: Yes.

THE COURT: You may proceed.

MS. FISHER: Thank you, your Honor. Your Honor, it's difficult for me to stand up and present an argument on behalf of Bryan Lankford, due to the lateness in which

I was involved in this case. Obviously, I don't have the advantage of knowing what the Court is considering all along. I appreciate Mr. Albers' recommendation. I'm sure that it was honestly made, and I'm sure that he handled this case, from the very beginning, in the most professional manner that he perceived his responsibility as a Prosecutor. I think that the Court knows Mr. Lankford or knows my position as to the defense that Mr. Lankford had up until this time. So I'm presently in a position to argue on behalf of Mr. Lankford as to whether he should receive an indeterminate life sentence or a fixed life sentence, and it's not an easy thing to do. I think Mr. – Dr. Estes' testimony showed that the life sentence itself – that Mr. Lankford never has understood his guilt. He has never felt guilty of murder, and Mr. Albers tells the Court that but for the Felony Murder Rule, the proof of Mr. Lankford committing murder is not there. This Mr. Lankford (indicating). So I'm in a difficult position, and I'm in a difficult position because Mr. Albers stands up and he recommends an indeterminate life sentence, which is the least option the Court has available, and obviously, if I were to – I don't want to waste the Court's time, but I think that it's – I think that it's important because I don't know where the Court is. You know, I've had an indication from the testimony that the Court rejected making an opinion prior to trial on – on that particular option. So I'm in a position where I have to argue for Mr. Lankford without having been here in trial, without having, in my opinion, a defense and having been convicted of first degree murder, and I don't think there's any question now with the Prosecutor's recommendation, that an

indeterminate life sentence is the appropriate sentence to be given to Mr. Lankford.

I am aware, however, of the community atomosphere [sic] towards the Lankfords, and I am aware, through my reading of the *Lewiston Tribune* and other things, that the Lankfords have never been two people, that the Lankfords have always been "the Lankfords." They have always been "the brothers." They have always been taken together as a single entity, and that never in the course of this – these proceedings has there ever really been a distinction between Bryan and Mark. There's been an attempt to make a distinction. Obviously, the Prosecutor has been capable of making that distinction, but I don't think that that distinction has been made sufficiently. I don't think Bryan Lankford has been presented to the Court or to the community as the person that he is. I think he's been brought in, dragged down with Mark Lankford, and I think that the reason that that is is [sic] because none of us, none of us can understand the kind of person Mark Lankford is, and if you can't understand the kind of person Mark Lankford is, how in the world can you understand the position of Bryan Lankford? If you can't understand how a person can be as violent and as ugly and as mean as to threaten his mother, his grandmother, his sister, his friends, how can you possibly say where Bryan Lankford is in this? How can Dr. Estes stand up there, who admits that Mark Lankford is a sociopathic personality, is manipulative, how can he say, "Based on my 30-minute evaluation, Bryan Lankford is a dangerous person."? The way he says that, and it is my understanding of his testimony, is because he brings Bryan in with Mark. He makes Bryan and Mark almost one in the same

person, and they're different people. They're two different people coming from the same environment and reacting differently. Dr. Estes, in his psychological, says – excuse me. He says:

> "The best predictor of dangerous behavior is past history."

And, then, he takes a stand and he says that Bryan Lankford is a dangerous man, and the history that Dr. Estes has to rely on is the fact that the first time Dr. Estes ever saw Bryan Lankford, Bryan Lankford stood convicted of first degree murder on two counts, and so Dr. Estes can put his professional reputation on the line, can take the stand and say, "Well, I can look at his past history and it seems to me somebody convicted of two counts of first degree murder is a dangerous person." And nobody can quarrel with that, but Dr. Estes spent approximately 30 minutes in one interview and an hour and a half in another with Bryan Lankford, under the situation where Bryan Lankford had already stood convicted, had already made complaints to the Court that he had never felt that he had been represented, was angry, was frustrated, and, then, he bases his opinion. He doesn't base his opinion on Bryan Lankford as the people who have lived with him since he was a little boy make their opinion, and who's going to be in a better position to know? The importance about Dr. Estes' testimony is two-fold. Number one, he supports what Bryan's family and friends say. He says Bryan is passive-dependent. Mark is explosive, manipulative, and sociopathic personality. He says that Bryan's fear is valid. He says that the concept is brought to the Court through his family and friends of the domination and control of Mark is valid,

and, then, he says, "However, it doesn't mean he couldn't initiate aggressive behavior." That's what his report says. Well, I don't think there's anyone – well, there may be. Excuse me. I don't want to overexaggerate here, but I think that most of us are capable of initiating aggressive behavior under certain circumstances. I think that most of us are capable of reacting violently, depending on the circumstances. I think that aggression, as Dr. Estes was talking about, was simply part of every one of our personalities, and it's there. It's a possibility, but I don't think he made a prediction, and I think that the important part of Dr. Estes' testimony was that Mark Lankford and Bryan Lankford should have been evaluated in terms of the relationship so that there would have been some evidence in front of a jury to determine what Bryan Lankford's culpability was. The importance of Dr. Estes' testimony is not so much his opinion as to the possibilities in the future, but his opinion as to what he saw. Even as late as July of 1984, he saw fear and he saw manipulation and he saw domination and he saw passive-dependency. So what he said is that he supported what the family said. He did make the statement on the stand, and I don't know where it came from because it wasn't in his report and I've never heard it before, that Bryan was manipulative. Because he wasn't pressed on the point, he didn't say how manipulative he is. I don't know that Dr. Estes was in a position to make that opinion. One thing that the Court should keep in mind is the purpose for which Dr. Estes was requested to make an examination. That was, one, for the purpose of sentencing, and, two, on the basis of my client's plea to the Court that he be examined. He was, in fact, examined, and the

purpose there was to determine his competency. Obviously, as a psychiatrist who works for the State, he knows what questions it is he wants to have answered, so he never was put in the position of examining Bryan Lankford and Mark Lankford under the circumstances of the relationship of the two. He did tell the Court that the relationship between Mark and Bryan was unique and that that relationship was not likely to be found in any other relationship. And, then, he said, "Well, based on Bryan's passive-dependency, he's likely to find these types of strong dominating people again," and obviously, that possibility exists. Bryan knows the nature of his passivity. He knows that he needs to break away from that. He knows that he needs to become more of his own person, and we're not in the position, obviously, of saying anything but that Bryan's looking at a long time in the penitentiary, and we're not saying that the Court has to let Bryan walk out on the street today and we're not saying that Mr. Lankford doesn't need help, because I think everybody in this courtroom, who listened to the type of life-style, the type of home environment, the type of abuse that Bryan Lankford has suffered from the day he was born, would agree that anyone born in that situation is going to come out with problems, and none of us can be surprised if Bryan Lankford has problems, but what the Court has to decide is: What's the nature of those problems? What's the possibility that those problems can be solved? What's the possibility of Bryan Lankford ever being back in society? And you have to determine that on what you know about Bryan Lankford, and what you know about Bryan Lankford is that he was born to a father who was a mean, violent, ugly man.

What you know about Bryan Lankford is that he suffered from the day he was born at the hands of that man, and you know that on the day that he died, he told Judy Risinger, "My God, what am I going to do?" Because when that man died, Bryan Lankford had nobody controlling his life. He had nobody dominating his life. He had nobody abusing him, and he was afraid because he had never been outside of an abusive situation in his life. We can all sit back and we can say, "Well, come on, Bryan. At 24 years old, isn't it time that you took responsibility for yourself?" And, yes, it is, and I think Mr. Lankford understands that, but he can't take responsibility for himself when he's never been given the opportunity to take responsibility for himself, because from the time his father died was the first opportunity he would have to be free of abuse, to be free of the ugliness that he found in life, Mark Lankford took over. Mark Lankford became head of the family. Mark Lankford took from his father every violent, ugly, mean characteristic that his father had. And it's not unusual, I don't think, in these types of situations where you have abuse, children react one of two ways. They either become abused or they become abusive. Mark Lankford became abusive. Bryan Lankford became abused, and Dr. Estes, in his position, feels like we can criticize Bryan Lankford for having let himself be abused, for having made the choice of entering into a relationship of domination and fear, and I question Dr. Estes' ability to say that Bryan Lankford has ever had a choice in his life in those types of relationships. Bryan Lankford has friends and he has family, and I think in normal criminal proceedings, you know, you bring the family of the defendant in and the family always says, "I

really, really love that person. I really don't think that person ought to get in trouble." And it's pretty easy for the Court to become accustomed to that type of testimony, for the Court to say, "Well, what do you expect a family to say? Obviously, the family's going to say that they like Bryan because Bryan's faced with a difficult situation." But it doesn't work with this family and it doesn't work with these friends because this family didn't come in and say they love Mark, and Mark is as much a part of the family as Bryan is. They didn't come in and say, "Let's give Mark a chance. He's my grandson. He's my nephew. He's my brother." They never once seemed to be testifying out of family duty or loyalty. They came to the Court voluntarily to tell you what they knew about Bryan Lankford because nobody had asked them about Bryan Lankford before this. Nobody had said, "Do you have something to say in favor of Bryan Lankford?" Nobody had contacted them. Nobody had called them, so for the first time, they come at their own expense without subpoenas and they say, "Bryan Lankford is a gentle man. Bryan Lankford is a loving man. Bryan Lankford does not hurt people. Bryan Lankford does not act in violent ways." And that testimony shoots in the face two counts of first degree murder, and so the Court has to – or Mr. Albers' explanation is, "Well, under the Felony Murder Rule that's why Bryan is convicted." All I'm asking the Court to do is to recall the testimony of the people that know him because whether – you know, whether or not they're psychiatrists, they saw the relationships day in and day out. They saw Bryan Lankford and they saw Mark Lankford, and they're in a better position to testify as to whether he's a dangerous man

than Dr. Estes is. They're in a better position than Dr. Estes to testify as to whether he can make a go of it, whether he has the capabilities because they've seen him. Dr. Estes has only the indicator of the jury verdict. He has only the past behavior. He has only 30 minutes, and what Dr. Estes says is, "Yes, that relationship exists and what the heck? He's a murderer and he must be dangerous."

Bryan Lankford is 24 years old. He has a limited education, but he has a desire to move forward. He has, at this point, a desire to be free of Mark, and for the first time, he has that opportunity. Perhaps Bryan Lankford could never be free of Mark Lankford without the intervention that has occurred, and so this is the first time that Bryan is ever going to be in a position to be free of Mark Lankford, and maybe maybe if this hadn't occurred, maybe Bryan never would have been free. Maybe he just becomes another victim of Mark Lankford's. How many victims does Mark Lankford get? How many people can Mark Lankford ruin their lives? And the only question before this Court is: Does the Court join hands with Mark Lankford and make Bryan Lankford another one of his victims or does the Court give Bryan something to live for? Does the Court say, "Bryan, you stand convicted of first degree murder, but, Bryan, you've got possibilities. Bryan, you can put your act together. Bryan, you can make it if you'll try, and we'll free you of Mark Lankford, and the rest is up to you." But if the Court finds itself in a position, because of the offense itself, to say to Bryan Lankford, "Forget it; I'm not going to take the risk because there's a possibility that you might meet up with another Mark Lankford," then you take away every bit of a 24-year-old man's hope and you tell him to go to the

penitentiary and sit there and try to understand why it is that Mark Lankford, once again, won the battle. You take away from Bryan Lankford any desire he has to take care of the situation, to address his problem. You take away from Mark Lankford – Bryan Lankford any hope that he has. Dr. Estes testified, "Bryan should adapt well, as long as the system doesn't abuse him," and you know we've talked about Bryan's fear of prison. Bryan's a victim. He's been a victim since the day he was born, and he's going into another victimizing situation, so, yeah, there's a possibility that, once more, Bryan Lankford becomes a victim, and it's just a question of whether you give him any hope to, one day, not be a victim, any hope to, one day, be able to stand on his own and be able to repay the people that came up here, be able to show them that their love for him isn't lost, isn't wasted, and I don't think that the Court believes Bryan Lankford deserves a fixed life sentence, and I don't think the court believes that Bryan Lankford needs a minimum of 20 years. I hope the Court doesn't think that because I think that Bryan Lankford doesn't have the coping mechanism to look at a sentence that says, "You'll be an old man before you ever walk the streets again." I'm asking the Court to give Bryan a chance. He's cried out for help, and he cried out for help all during these proceedings, and he hasn't been responded to, so, now, he's in the position that he – that he finds himself in, and we're asking the Court not to worsen his position. We're asking the Court to, at least, give him a chance and let him go to prison, but let him have a belief that, one day, he'll get out of prison. The purposes of punishment include the protection of society,

and I don't think there's any evidence that Bryan Lankford has ever acted violently outside of the influence of Mark Lankford. I don't think society is at stake, that society needs more than 10 years of Bryan Lankford's life.

And the other issue is rehabilitation, and I don't think rehabilitation is a possibility if you take away his hope. We'll ask the Court to give Bryan Lankford the minimum sentence available, which is an indeterminate life sentence – two indeterminate life sentences to run concurrently.

THE COURT: Thank you, counsel. Well, the options available to this Court are an indeterminate life sentence or a fixed life sentence for a period of time greater than the number of years he would serve on an indeterminate life sentence, i.e., ten. For example, a fixed term of 40 years or death or a fixed life sentence. So there are a great number of possibilities available to this Court with reference to sentencing in this case. The State and the defense have both suggested and requested that this Court impose an indeterminate life sentence or two indeterminate life sentences. The state has suggested that the Court consider letting those sentences run concurrently or together at the same time. I think one first must analyze what that would mean in this case. That sentence would result in Bryan Lankford being eligible for parole in less than ten years, considering the fact that he's served a considerable amount of time in the County Jail. In view of the recommendation or suggestion that I run the two sentences concurrently, the recommendation would be, in essence, that this Court sentence Bryan Lankford to

spend, from this day, less than five years in the penitentiary for the murder of each one of the two Bravences, whose names have not yet been spoken today.

The defendant in this action, Bryan Lankford, has given a number of stories concerning the nature and extent of his participation in the murder of Mr. and Mrs. Bravence. At one time, he stated that he and his brother had no contact whatsoever with the Bravences. Another time he said he just held a gun while his brother murdered them and that he loaded the Bravences into the van, when they may or may not have been alive, and that he drove the van into the mountains and that his brother covered them with brush while he waited in the van and while his brother left the van, and that they drove away and that he and his brother wined and dined on the Bravences' money shortly thereafter at a time when the Bravences were either dead or dying in the mountains, and Bryan made no effort whatsoever to notify anyone of their whereabouts. He's also said that he murdered the Bravences alone that he smashed their skulls with a rock, and that his brother didn't do anything. We know one thing. We know that both Bryan Lankford and Mark Lankford have been in trouble with the law on numerous occasions. Both Bryan Lankford and Mark Lankford have spent time in jail, and both are convicted felons. Bryan has been convicted of robbery.

MS. FISHER: I don't mean to argue with the Court, your Honor, but a probation in Texas is not considered a conviction.

THE COURT: He was charged with the crime of robbery, placed on probation, and in that particular

offense, according to the Presentence Investigation, when he stole – or went into the Safeway, he had upon his person a gun or something that looked like a gun, and to the clerk, I'm sure it mattered not. it was a threat to that clerk of Safeway's, to that clerk's life. It is not as if we are dealing with a totally innocent and clean individual. Now, whether or not he had a gun or something else is something that we will never know because he would have to tell us, and he is a liar, and he is an admitted liar. He's a deceitful individual.

MS. FISHER: Your Honor, I think it's fair to say that the State of Texas couldn't prove that he had a gun.

THE COURT: Counsel, I'm not here to argue with you. Bryan has a violent background, and he's a violent individual. Nineteen days ago, according to the Presentence Investigation Report, he threated [sic] the life of a fellow inmate in the Idaho County Jail. Nineteen days ago. Now, the State's suggestion that the defendant, Bryan Lankford, receive, as I stated earlier, a sentence that would make him parole-eligible in five years for the death of each one of the Bravences is nothing more than a slap on the wrist when one considers his criminal history and the crimes that he committed and the total lack of remorse that he has shown for the murder of the Bravences. Now, I think this sentence that has been recommended to me would be contrary to the best interest of society. It would certainly depreciate the seriousness of the crimes that Bryan Lankford has been convicted of, and, in my opinion, seriously undermine the faith that society has in the judicial process. Now, if proper sanctions are not imposed for crime – criminal conduct, crime

will, obviously, increase, and society will be put in jeopardy, and they'll be at the mercy of violent individuals such as Bryan Lankford. If I don't impose appropriate sanctions for a crime, eventually the people will by themselves or law enforcement officers will by themselves and, then, society, as we know it today, will not continue.

Now, Dr. Estes has described Bryan as a calculating, deceitful individual, an individual who transfers his responsibility for his actions to others, including his brother. He has described Bryan Lankford as being dangerous and aggressive, and although he says there's a possibility that he may change, he states that his problems are such or are of such a nature that they do not lend themselves to effective treatment. Now, we have heard, as I indicated earlier, a lot of stories about how the Bravences died. One brother says the other did it. The other brother says the other did it, and Mr. Bryan Lankford has said both. He said that he did it all, and at another time, he said his brother did it all, but the evidence in this case clearly demonstrates that, but for the actions of Bryan Lankford, the Bravences would be alive today. The evidence demonstrates that both Mark and Bryan Lankford participated directly in the brutal slaughter of Bravences, and as a consequence, I am not in a position to accept the State's recommendation for punishment, in view of this brutal and unprovoked, unwarranted, premeditated, and depraved killing. Now, because I'm not prepared to go along with the recommendation that he receive the minimum, I can't just impose the judgment that I feel is appropriate, obviously, without setting forth specific writting [sic] findings, as required by law, statutory as well as common. And in view of the

fact that much of what – or at least some of what I will use to base my decision on is based upon arguments of counsel today and testimony received in this courtroom today, and in view of the lateness of the hour, I am not in a position to render judgment, and as a consequence, the final decision in this case will be prepared after I prepare the requisite findings required of me by law. This matter will be thus taken under consideration. I'll announce my decision on Monday, October 15th, 1984. Mr. Bryan Lankford will be brought into court on that day, and my judgment will be announced.

Is there anything further from the State?

MR. ALBERS: No, your Honor.

THE COURT: From the defense?

MS. FISHER: Your Honor, the only objection I have is that if we can't get the sentencing today – I couldn't get a continuance. I mean I made a Motion for continuance. I've got my client prepared to be sentenced today. You know, it seems like the Court is playing with him.

THE COURT: Counsel, nobody's playing with anybody here. Nobody's playing with anybody, counsel. I can guarantee you that. The law requires that I do certain things. The law requires that I do it right. I'm attempting to do so. I need to make those findings, and that will be done on Monday.

MS. FISHER: Can I ask your Honor if you're going to take into consideration the testimony heard at Mark Lankford's sentencing?

THE COURT: With reference to Bryan Lankford's sentencing?

MS. FISHER: Yes.

THE COURT: Absolutely not. The evidence is closed in this case.

MS. FISHER: Will Bryan Lankford be sentenced prior to Mark Lankford's sentencing?

THE COURT: Will Bryan Lankford be sentenced prior to the time Mark Lankford is sentenced?

MS. FISHER: Prior to his Hearing, your Honor.

THE COURT: I do not know. We shall be in recess.

PRESENTENCE REPORT

THE STATE OF IDAHO Plaintiff vs BRYAN STUART LANKFORD Defendant	Date of Report: 5/29/84 Offense: First Degree Murder, 2 counts Judicial District: Second County: Idaho Judge: Honorable George Reinhardt Defense Counsel: Wilfrid Longeteig Prosecuting Attorney: Dennis Albers Misd. ( ) Felony (X)

Case Number: 20157

Date of Sentencing: June 28, 1984
Due in Court: June 14, 1984

IDENTIFYING DATA

SOCIAL SECURITY: 463-31-7054	HEIGHT: 6'	WEIGHT: 150 lbs.
AGE: 23	HAIR COLOR: Blonde	SEX: Male
DATE OF BIRTH: 9/21/60	EYE COLOR: Blue	GLASSES: None
PLACE OF BIRTH: Houston, TX	COMPLEXION: Medium	
RACE: Caucasian	DEXTERITY: Right	CITIZENSHIP: U.S.
	FBI: 696 327 W9	CIB: None

OFFICIAL VERSION

POLICE REPORT: According to a report submitted by the Federal Bureau of Investigation, an investigation was instituted on July 5, 1983, by the Los Angeles Police Department Major Crimes Detail. Detective Varney of the Los Angeles Police Department related that on July 5, 1983, a 1979 Volkswagon van registered to Robert M. Bravence was recovered by the Los Angeles Police Department in a non attended parking lot in the downtown area of Los Angeles.

It was determined that Robert and Cheryl Bravence, husband and wife, had left El Paso, Texas on June 13, 1983, on a vacation through Arizona, Nevada, Montana and Idaho. According to family members, the Bravences had called either late afternoon or early evening on June 21, 1983, from Grangeville, Idaho and related that they planned to arrive in Scottsdale, Arizona on/or about June 29, 1983. The Bravences never arrived. Investigation revealed the Bravence's Mastercharge card had been used from June 21, 1983 and receipts continued to be received on charges on that card as late as July 1, 1983. The victim's [sic] Mastercharge card was used exclusively in the states of Oregon and California. The last known charge occurred on July 1, 1983 at Denny's Restaurant in Costa Mesa, California. Also used were the Bravence's American Traveler's checks, of which two were cashed in San Francisco and two cashed in Los Angeles.

Aerial searches were conducted in an effort to locate Bravences and any of their belongings not recovered in the van. The searches met with negative results. Witnesses had provided the FBI with a description of the

person using the Bravence's credit cards at various businesses throughout Oregon and California. Another witness had advised picking up two hitchhikers who met the subject's description and that sometime around June 20, 1983, had dropped them off near the Bravence's camp site.

In September 24, 1983, hunters located two human bodies covered with forest debris. These two human remains were identified as the victims, Robert and Cheryl Bravence. Located approximately one quarter mile from where the victims were located was a 1982 Chevrolet Camaro registered to Mark Henry Lankford of Houston, Texas.

According to the FBI a positive identification had been made of handwriting samples of Mark Lankford on the signature cards from Robert Bravence's mastercharge receipts. Positive identification was also made on fingerprints of Bryan Lankford recovered from items in the victim's van located in Los Angeles.

An autopsy performed on the two victims disclosed that both victims had died of blunt trauma to the skull. On October 2, 1983, the defendant and Mark Lankford were arrested in Liberty County, Texas on a warrant issued from Idaho County charging two counts of murder. Subsequent to that arrest, a number of items belonging to the victims were discovered at the defendant and co-defendant's camping spot. Both the defendant and the co-defendant were extradited back to Idaho.

INTOXIMETER 3000: Does not apply.

VICTIM'S STATEMENT: Victim #1: Robert M. Bravence, deceased.
Victim #2: Cheryl A. Bravence, deceased.

DEFENDANT'S VERSION: "The reason I left Conroe, Texas was becaus my probation officer told me I was going to the pen. Mark & I left Conroe on or about May 15, 1983 after Mark told me he was leaving Houston, Tex. for a unknown reason to me, and we should leave together & so we did he picked me up in his Z-28 Camaro we drove out of Texas and wound up in northern Idaho. We camped out for about a week or so & I decided to go back to Texas becaus I was just to cold and I was not acustom to the conditions Mark decided he would go with me after a while, so we left walking to the nearist town so I could call Roy Ralmuto to send us some money to get back to Texas a man picked us up about 3 or 4 hour after we left camp his name was Cox he took us to a camp ground & said that was as far as he could take us. We had brought a 12 gauge shotgun with us in case we were attacked by bear or something we got out of the jeep Mr. Cox left and Mark & I went down to the river and sat on some rocks. Mark told me there is a better way then walking and said we could still a car he me he would have to talk me in to it for he knew I would be against it so we started walking down the road & he finely talked me in to it, so we came up on a V.W. van and a man & a woman we continued to walk down the road and Mark said we could still the van because there were only two people there so he told me to just walk up to them and start talking and he would take the van so I did I had the shot gun. I went to them and said Hi and we started

talking about the pretty country & all and the lady went down to the river to wash out a pan or something the man and I were talking and Mark came running into the camp and told the man to get down on the ground so he did and Mark pulled out a stick like a night stick that a policeman wears but only about a foot long and hit the man on the back of the neck nocking him out he hit the man at lest twice and the lady came up a few seconds latter and Mark told here to get down on the ground also and she did and then he hit her once I think and then he told me to help put the things around camp in the van so I did and then we put the people in the van and Mark tried to get the van started but could not so I tryed & got it started and drove back near the place we were camped at Mark told me to back in a little road so I did, Mark got out and to the man & the lady out in the woods one at a time. He came back & got in the van and we left we wound up in L.A. Ca. I called Roy Ralmuto and he sent us some bus tickets and we went back to texas there is a lot more to this and all and whatever want to know all of the story I give my permission to them to read my transcripts of the trial, I did take polygraph test to all of this and it is the truth so help me God." Signed: Bryan S. Lankford, dated April 3, 1984.

CO-DEFENDANT'S VERSION. (for the court's information the following is submitted.) This investigator asked the co-defendant (Mark Lankford) to present his version of this particular crime and the defendant refused. He indicated that at a later time would possibly present his side of the story. At a later time during the interview process, the defendant relented and related that he would

offer his verbal version as to what occurred. The following statement is not typed verbatim.

I (Mark Lankford) had a good job in Texas and a lot of material things to include a nice apartment, a fine car and clothes and yet I did not feel fulfilled and felt as though I was missing something because I was falling into the materialistic trap and was acting like everyone else in that you are judged solely on what you own and not what you are. So I decided to leave. I had approximately $2,000.00 cash and had called some friends and family and indicated that I was leaving. My intentions were to drive to Canada and camp out and live in the woods for a time. A short time later Bryan contacted me and related that he was in jeopardy with the authorities and had indicated that he was going to be sent to the penitentiary and begged me to take him along. I indicated that I would. After we had arrived in Idaho, Bryan began to complain that it was cold and wanted to return to Texas. I had covered my car with boughs and branches and had anticipated living in both my car and a small tent at the rear of it. On the day Cox had picked us up, we were walking to Grangeville so Bryan could make arrangements to return to Texas. We got in Cox's car and rode for awhile and I was beginning to feel bad. I'd had some stomach problems and has to use the restroom. We stopped at the campground and I went to use the get back to Texas a man picked us up about 3 or 4 hour after we left camp his name was Cox he took us to a camp ground & said that was as far as he could take us. We had brought a 12 gauge shotgun with us in case we were attacked by bear or something we got out of the jeep Mr. Cox left and Mark & I went down to the river and sat on

some rocks. Mark told me there is a better way then walking and said we could still a car he me he would have to talk me in to it for he knew I would be against it so we started walking down the road & he finely talked me in to it, so we came up on a V.W. van and a man & a woman we continued to walk down the road and Mark said we could still the van because there were only two people there so he told me to just walk up to them and start talking and he would take the van so I did I had the shot gun. I went to them and said hi and we started talking about the pretty country & all and the lady went down to the river to wash out a pan or something the man and I were talking and Mark came running in to the camp and told the man to get down on the ground so he did and Mark pulled out a stick like a night stick that a policeman wears but only about a foot long and hit the man on the back of the neck nocking him out he hit the man at least twice and the lady came up a few seconds latter and Mark told here to get down on the ground also and she did and then he hit her once I think and then he told me to help put the things around camp in the van so I did and then we put the people in the van and Mark tried to get the van started but could not so I tryed & got it started and drove back near the place we were camped at Mark told me to back in a little road so I did, Mark got out and to the man & the lady out in the woods one at a time. He came back & got in the van and we left we wound up in L.A. Ca. I called Roy Ralmuto and he sent us some bus tickets and we went back to texas there is a lot more to this and all and whatever want to know all of the story I give my permission to them to read my transcripts of the trial, I did take polygraph test to all of this

and it is the truth so help me God." Signed: Bryan S. Lankford, dated April 3, 1984.

PRIOR RECORD:

Date	Department	Offense	Disposition
*1979	Conroe, TX	Battery	$30.00
12/16/80	Houston, TX	ROBBERY	10 yrs. prob. + 20 days jail, Prob. violation filed for DUI and Eluding.

Note: The records indicate the defendant entered a Houston Safeway market, pulled up his shirt and showed the clerk a dark handled object resembling a handgun. The defendant demanded money and took $462.00. The defendant was chased by store employees and held for police.

*5/83 Conroe, TX Speeding

*Self-admitted: Also, at age 14 in Cleveland, Texas, he reports he was arrested for public intoxication. He was given 3 days jail.

SOCIAL HISTORY

FAMILY DATA

FATHER: James R. Lankford, deceased. He died in 1980 at age 48 in an automobile accident. His occupation was a welder.

MOTHER: Gretchen Maurer AGE: 47
ADDRESS: 11301 Rozell, San Antonio, TX
OCCUPATION: Housewife/baby sitter

SIBLINGS – NUMBER OF BROTHERS: 4
NUMBER OF SISTERS: 2
NUMBER OF STEP-BROTHERS: 1

SIGNIFICANT FAMILY INFORMATION: The defendant relates he is fourth born in a family of seven children and describes his early life as "violent hell". He relates his father subjected the family members to a number of physical assaults. He relates on one occasion Mark's (co-defendant) leg was broken by his father at age three months for wetting the bed. The defendant relates his father knocked him out the boat while they were fishing for catching the wrong kind of fish. Mr. Lankford describes his father as an individual did not drink or smoke, but treated his children the way he stated he had been raised. However according to the defendant, his father's brother related that he was not treated unfairly while growing up. Bryan relates being sent home from school a number of times because of the number of bruises that he had on his body. He relates his mother would not intervene in these instances of physical abuse because if she did so she too would suffer physical abuse from the father. He relates his mother left the family home a number of times as a result of these physical altercations, but always returned because she could not support herself. He remembers very few good times growing up and recalls that all the children were punished the same. He does recall, however, the female children did not sustain the physical punishment that the male children did. He does relate, however, after the younger brothers were born that his temperment [sic] seemed to mellow and they sustained less physical punishment than he and the other older children did.

Bryan left home, he relates, at either age 12 or 13 and on occasion would return to the family home to visit but never to stay permanently. He relates that his brothers,

Mark and Robert, left at an early age in all probability because of the physical abuse. He recalls his sister, Nora, married at age 17 just to leave home. Bryan recalls no animosity towards his mother but recalls that his father would never try and teach the children anything. They had to learn for themselves. He describes his early life as very poor and relates that they had an outhouse at their family home until 1976. He felt his father could afford to update their lifestyle, but would not spend the money on the family. The defendant relates that he cared for his father more than anyone with the exception of his sister, Nora, and was very much saddened by his father's death. He relates, "I just felt I should respect my father no matter what he did to you even though I don't think you should have children if you're not going to take care of them". He relates his brother was once arrested for public intoxication and does not recall his father every being arrested for any charge. He relates that he and his mother correspond and on occasion he writes his other brothers and sisters.

INTERESTS AND ACTIVITIES: The defendant relates he enjoys rollerskating with the last time being in July of 1983. He owns his own skates. He enjoys working with leather and the last he participated in this activity was approximately two years ago.

RESIDENCE HISTORY

(a) CURRENT: Currently the defendant is incarcerated at the Idaho County Sheriff's Office Jail in Grangeville.

(b) PRIOR: Prior to that he describes himself as a life-long resident of the State of Texas.

MARITAL STATUS

PRESENT RELATIONSHIP: The defendant is divorced.

PREVIOUS MARRIAGES: In November of 1979 he married the former Lara Haas. They lived together for approximately one and one-half years and separated because his wife was unfaithful. They divorced in 1972. He lists no other marriages.

NUMBER OF CHILDREN AND AGES: He relates that his former wife had one child by a previous marriage, however, they had no children of their own.

MILITARY DATA: In 1980 he enlisted in the U.S. Air Force and stayed for three weeks and left because he did not like the yelling and the discipline he was subjected to in boot camp. He relates this discharge was honorable.

EDUCATION: In 1977 the defendant left high school because he could not afford to work and support himself. He relates that at that time he was living by himself and had a long walk to work everyday and could not work and attend school both. In 1982 he attended real estate school but did not achieve his real estate license. He has not sought any other formal education.

EMPLOYMENT – PRESENT EMPLOYER: The defendant is currently unemployed.

PAST EMPLOYERS

1. American Van Lines, Conroe, TX OCCUPATION: mover WAGE: $350/400 per week DATES EMPLOYED: 2 weeks in 1983 REASON FOR LEAVING: Left when he and the co-defendant left the state.

2. Shaefer-Holmes Home Builders San Antonio, TX OCCUPATION: asst. superintendent WAGE: $500 a week DATES EMPLOYED: 3-4 weeks in the winter of 1983 REASON FOR LEAVING: He returned to Conroe, Texas.

EMPLOYMENT CAPABILITIES: Furniture mover, real estate sales, building construction, carpentry. He relates having difficulty in sustaining long term job commitments because of family problems or situations.

ECONOMIC STATUS

ASSETS:	VALUE:
canoe	$ 400.00
household items, silver	2000.00-3000.00
belt buckles	10000.00
trust fund (held by Roy Ralmuto)	

LIABILITIES: The defendant reports no liabilities.

HEALTH

(a) MENTAL: The defendant relates he saw Dr. Gombus in November of 1983 after he had attempted to hang himself while incarcerated at the Idaho County Jail. Mr. Lankford relates since being incarcerated he dreams about dying in his sleep, the police shooting him and the fear of the penitentiary. The defendant relates he has never been in any mental institutions nor has be undergone any type of alcohol counseling. Judge Reinhardt has ordered the defendant undergo psychiatric evaluation to be performed by Dr. Michael Estes.

(b) PHYSICAL: He relates that he is "very weak", is inclined to fainting spells, interear infections, tonsilitis and reoccurring headaches. Currently he is taking medication for tonsilitis and ear infections and the last time he saw a physician was in April of 1984. He is not allergic to any medication.

(c) ABUSES (ALCOHOL AND/OR DRUGS): The defendant started to use alcohol at either age 13 or 14 and describes himself as a casual drinker who rarely gets "bombed." At the same approximate age the defendant started to use marijuana, acid and glues. He describes himself as a casual marijuana, user but would use downers (approximately five) every week and was using speed approximately every day. He relates he could use drugs class and/or education. Mr. Lankford relates, "by myself I don't do drugs but around others I'm easily influenced to use drugs and would try to stay away from those kinds of people."

(d) VALUES AND OUTLOOK ON LIFE: "I have a strong outlook on life. I want to do what's right. I want to straighten out my life. People say I was a victim of circumstance and was influenced by my brother."

INVESTIGATOR'S COMMENTS AND ANALYSIS OF DEFENDANT'S CONDITION: Bryan did not complete his pre-sentence questionnaire, but after contacting his attorney for clarification, was cordial and appeared willing to answer this investigator's questions.

Mr. Lankford relates he, too, is a victim. He relates his actions were largely influenced by his brother (co-defendant, Mark Lankford). Bryan states he feared his brother and usually acquiesced to his wishes because of that fear. During the interview the defendant and the investigator were interrupted by the jailer returning the co-defendant to the jail area. Bryan became extremely apprehensive because we were in a non-secured area and questioned me repeatedly about the co-defendant's whereabouts. Bryan appeared very frightened by the close proximity of his brother.

Mr. Charlie Hill, a past employer of the co-defendant, relates he has numerous conversations with the defendant's grandmother. She related Bryan was influenced by Mark and would usually do what Mark told him to do. Bryan relates he was persuaded by his brother to enter the victims' camp on the pretext of tying the victims up and stealing their car.

It appeared to this investigator, however, the defendant appeared almost mechanical. His conversation was monotone, his delivery almost rehearsed. The defendant related a period in his life, when he was a youngster and up to approximately six years ago, when he was approached by a past employer who solicited Bryan to participate in homosexual acts. Bryan relates that this past employer would give them money to allow him to "go down on him." He relates these same acts were performed on two of his brothers as well, to include Mark. Bryan related feeling ashamed, and feeling very dirty about his actions, yet when he talked about it he expressed very little visible emotion.

The defendant appears to be a follower if what he says about his relationship with his brother is true. The defendant appears to reflect a poor self-image. His remarks about his past homosexual acts and his comments about this instant offense, as well as the remarks relative to use of drugs, would appear to reinforce that thinking.

Mr. Bud Mason, the investigator who administered the polygraph, asked Bryan, "Did you personally strike the victims", and Bryan stated he did not. Mr. Mason feels this response was deceptive. According to Idaho County Sheriff, Roger Laughlin, it would appear because of the

terrain and windfalls that two persons would have been involved in moving the bodies from the van to their ultimate place of discovery; an act Bryan adamantly denies. There is clear indication that Bryan used the Bravence's credit cards while traveling through California as well as possessing items belonging to the victims at the time of their arrest.

Both the defendant and the co-defendant are accusing each other of being the principal murderer. It appears, however, Bryan Lankford was present during the assault and actively participated in the taking of the victim's personal items as well as using their money and credit cards for personal gain.

TREATMENT PROGRAMS AND/OR OPTIONAL RECOMMENDATIONS: This investigator does not make a recommendation relative to sentencing for this defendant.

RESTITUTION AND/OR ABILITY TO PAY FINE: The defendant is unemployed, however, he does relate a $10,000 trust fund held by Roy Ralmuto in the State of Texas and therefore appears capable of paying either fine and/or restitution.

COLLATERAL CONTACTS: MVR; CIB; Idaho State Supreme Court; Idaho County SO; Grangeville PD; Liberty County, Texas SO; Charley A. Davidson; Chief District Attorney or Harris County, TX; R.A. Bud Mason, Idaho Bureau of Investigation; 232nd District Court, Houston, TX; Bruce Corrobim, Absconding Unit for Probation & Parole, TX.

Approved:

/s/ Del E. Hansen
Del E. Hansen
District Manager

JMS:ml

cc: Defense
Prosecutor
File

Respectfully submitted,

/s/ John M. Schrader
John M. Schrader
Probation & Parole Officer
Division of Probation & Parole
P.O. Box 375 – District #2
Lewiston, Idaho 83501

* * *

PRE-SENTENCE INVESTIGATION

COURT NAME: Bryan Stuart Lankford
TRUE NAME: Bryan Stuart Lankford
BORN: September 21, 1960
AGE: 20
RACE: Caucasian
SEX: Male
CITIZENSHIP: U.S.A.
MARITAL STATUS: Separated
ORDERED BY: The Honorable Vance Stoval
for The Honorable J.D. Guyon
COURT: 232nd District Court
DATE ORDERED: January 22, 1981
OFFENSE: Robbery
CAUSE NUMBER: 326758
DATE OF CONVICTION: January 22, 1981
DATE OF SENTENCING: March 10, 1981
CO-DEFENDANTS: None

On January 22, 1981, Bryan Stuart Lankford appeared with his appointed counsel, F.M. Stover, and pled guilty to the above offense. The District Attorney made no

recommendation. Sentencing was deferred pending a presentence investigation.

I. PRESENT OFFENSE

The following information is a summarized version of Houston Police Department offense report number 21473580.

On December 16, 1980, Officer Zelenske received a call to the Safeway Store on 8710 Bellaire in regards to a robbery.

Upon arrival, Officer Zelenske was met by Mr. Seipio Wade, a witness who had Bryan Stuart Lankford, the defendant, in custody. The defendant appeared extremely muddy and wet. Mr. Wade informed Officer Zelenske that a store employee, Ms. Judy Swan, yelled "99", which refers to "shoplifting" and Mr. Wade proceeded to pursue the defendant with two other witnesses, on foot into the 8800 block of Bellaire. Mr. Wade observed the defendant with his hands in the air and a bag in one of his hands. The defendant was then seen jumping into a bayou, and Mr. Wade yelled out to the defendant that "he was going to get the police". The defendant yelled back at that time, stating, "I give up. I am tired of running".

Officer Zelenske, Mr. Wade, and the defendant returned to the bayou to locate the stolen money. They searched the bayou area and could not locate the bag that the defendant held prior to being apprehended. The defendant told Officer Zelenske he hid the money by "shoving it down in a hole which was filled with water".

Officer Zelenske could not locate a weapon on the scene. The defendant advised officers that he only had a piece of black wood or plastic "shaped like the butt of a pistol". After searching the area, Officer Zelenske returned to the store, where he spoke with Ms. Swan.

Ms. Swan reported that the defendant was in the store approximately twenty minutes before he approached the courtesy booth. She explained that he approached her twice, initially asking for "John Lennon albums". On the second approach, approximately two minutes later, the defendant handed her a paper bag and said, "Fill it up bitch, with twenties". Ms. Swan related that she followed the defendant's instructions and he "grabbed her" and said, "Your luck bitch", before running out the front of the store.

Officer Zelenske then spoke with the defendant, who advised that he stole the money because he needed it for Christmas and added, "It's the dumbest thing I've ever done". On his own accord, the defendant attempted to locate the bag of money he hid in the bayou.

The defendant was subsequently arrested and charged with Aggravated Robbery in the 232nd Distirct [sic] Court, cause number 326758. The charge was reduced to Robbery on January 22, 1981.

II. DEFENDANT'S STATEMENT

The defendant related that "a plan" was devised by himself and his brother, Mark, to rob the Safeway Store the same day the present offense occurred. He advised that his brother "suggested" the incident to him, but did not become involved "because he was on parole" from the Texas Department of Corrections.

The defendant explained that he was living with his brother Mark and "they were experiencing financial difficulties". He further disclosed that their financial problems stemmed from "spending too much money". The defendant related that he and his brother planned to purchase a townhouse with the stolen money.

Prior to committing this offense, the defendant consumed "a few beers". He stated that he was "nervous" and "trying to get his courage up". When the defendant approached the courtesy booth in the store, he reported that he had a "black rubber hose inside his shirt", to make the employee think he had a weapon.

The defendant recalled "giving up" after fleeing the store because "he was tired of running". He advised that he moved out from living with his brother Mark when he was released on bond. The defendant stated he had not discussed the incident with his brother and that "they are not speaking". He expressed remorse over his involvement and regrets his actions.

III. PRIOR RECORD

A. Juvenile

The defendant advised that he has been arrested on two occasions as a juvenile in Liberty County, Texas. In May of 1976, he recalled being arrested for Public intoxication and receiving one year probation, which he completed. In June of 1978, the defendant related he was arrested in Conroe, Texas for Disorderly Conduct and fined $29.55.

B. Adult

Date	Location	Offense	Disposition
12/16/80	Houston, Texas	Robbery	Refers to present offense.

IV. OTHER INFORMATION

Interview With Mr. Terry Ripperda, Manager of the Safeway Store at 8710 Bellaire

Mr. Rippenda reported a total loss in cash of $462.00 as a result of this offense. He explained that "no one

was injured", and there were no losses in property or damage to the store. Mr. Rippenda declined to express feelings concerning punishment, however, he expressed a strong desire to receive restitution. Restitution in the total amount of $462 may be forwarded to:

Security Department
Safeway Stores Incorporated
4301 Windfern
Houston, Texas

Interview With Mr. James Robert Lankford, the Defendant's Father

Mr. Lankford recalled no problems raising the defendant as a child. He described his son as "a quiet child" who had "two or three best friends" and "rarely went out". Mr. Lankford stated that his son moved away from home in 1980 because "he preferred to live in a bigger city". He explained that the defendant was raised in "a God fearing home" and has not discussed the present offense with him. Mr. Lankford could not relate any possible reasons for his son's involvement in this incident.

Mrs. Gretchen Lankford, the defendant's mother preferred to submit a letter in behalf of her son, rather than being interviewed by this officer. Her letter is appended to this report.

Interview With Mr. Robert Lankford, the Defendant's Brother

Mr. Lankford is twenty-three years old. He has been employed as an electrical systems designer for Brown and Root for three and a half years. He described the defendant as "the type of person who cares about others". Mr. Lankford related that his brother is "embarrassed and ashamed" by his involvement in this incident. However, he could not understand why the defendant became involved, other than to state "he is young and impressionable".

Mr. Lankfrod [sic] advised that he and his brothers and sisters were raised in an "insecure" home environment. He elaborated by reporting that his father hit all the children with his fist when they were young and "kicked" each child out of the house when they became fifteen years old to "take care of themselves". Mr. Lankford disclosed that he and his other brothers went to relatives and friends "for a place to live". He also revealed that he was sexually exploited by an uncle, who "took him in" when he had no place else to live.

Mr. Lankford described his father as "illiterate and very temperamental". He stated that his father was always "ashamed" of their family because they "looked poor". This type of home situation gave all the children an "inferiority complex", according to Mr. Lankford.

Prior to the age of fifteen, when the defendant and his siblings were living at home, Mr. Lankford related that his father required them to work in the summer "to pay for their clothes and school supplies". He explained that the defendant did not graduate from high school in the community because after he was "kicked out of the house", he moved around quite a bit.

Mr. Lankford described his mother as "afraid, insecure, and subservient" to their father. He related that both of his parents have a six grade education.

Mr. Lankford advised that he has been arrested on one occasion for Disorderly Conduct, Public Intoxication, and Indecent Exposure. He feels that he and his brother have a better understanding of their actions in relation to their past. Mr. Lankford feels the defendant realizes the seriousness of his involvement in this offense and would be a good risk for adult probation.

References

Mr. Ron Jones of 5239 King Fisher has known the defendant four years, having become acquainted through Mr. Roy Ralmuto. Mr. Jones related that he has always "trusted" the defendant and has continued to trust him since this incident occurred. He explained that the defendant is "not the criminal type", but rather a victim of a poor home environment. Mr. Jones sees the defendant approximately "once every three weeks" and expressed confidence in the defendant's ability to refrain from future criminal activity.

Mr. Roy Ralmuto of 2003 Briarcrest has known the defendant and his family for approximately six years. He advised that the defendant comes from "a large family", where the children were put out of their home by their father at the age of fifteen. Mr. Ralmuto explained that when the defendant and his brother Robert experienced this "loss of guardianship", they moved in with him in Houston. Mr. Ralmuto initially became acquainted with the defendant's aunts. He related that the defendant came from a "poor home environment". Mr. Ralmuto advised that he plans to open a landscape contract business with the defendant when the present offense is resolved. He further advised that he could provide adequate supervision of the defendant if the Court grants him a probated sentence.

Letters of reference are appended to this report.

V. PERSONAL HISTORY

The defendant related that he was raised predominantly in Cleveland, Texas. He explained that during a portion of his childhood, his father was in the service and the family "moved around" on a few occasions.

The defendant has lived in Houston for approximately the past two years and resided with Mr. Roy Ralmuto, a personal friend and previous employer.

A. Family History

The defendant's parents, James Robert Lankford, age forty-eight, and Gretchen Lankford, age forty-five, were married in 1955. They have had seven children during their marriage, which is still intact. The defendant has four brothers and two sisters, all of which live in Texas.

The defendant's father is self-employed as a carpenter and his mother is unemployed.

B. Marital History

The defendant ceremonially married Laura Lee Lankford on November 30, 1978. They separated approximately one year later "due to financial difficulties", but have remained "friends". There were no children born from this union. Ms. Lankford presently resides in Conroe, Texas. The defendant stated he intends to obtain a divorce, but did not specify at what time.

C. Family Relationships

The defendant described his relationship with other family members as "good". He related that his relationship with his brother Mark is "very bad" since the present incident occurred. The defendant explained that his brother influenced his decision to become involved in this offense and added, "we have not made contact since my arrest".

D. Education

The defendant left Tarkington High School in Cleveland, Texas during 1977, upon completion of the eleventh grade. He later acquired a General Equivalency Diploma in January of 1980. The defendant is interested in attending college to study horticulture.

E. Religion

The defendant is Protestant by faith. He related that he attends church on an irregular basis.

F. Personal Health

The defendant has never suffered from a serious illness. He has no physical handicaps. The defendant further advised that he has never received psychological or psychiatric counseling and testing.

G. Interests and Activities

The defendant enjoys leather work, fishing, and "hunting for exotic outdoor items".

H. Employment

Dates	Employer and Address	Position
2/3/81 to Present	K-Mart 12151 Katy Freeway Houston, Texas	Nurseryman
6/80 to 11/80	Gerland's Food Fair 4330 North Freeway Houston, Texas	Produce clerk
10/20/79 to 12/12/79	Weingarten's 11041 Westheimer Houston, Texas	Produce clerk
1/79 to 2/79	Kroger's I-45 Conroe, Texas	Produce clerk
1/19/79 to 11/9/79	Roy Ralmuto 2003 Briarcrest Houston, Texas	General labor

The defendant's previous employer, Mr. Roy Ralmuto, advised that the defendant performed general labor duties to maintain his rental property. He described the defendant as displaying "excellent attendance, ability, and reliability".

1/5/78 to 4/3/78	Risinger Landscaping Conroe, Texas	Landscaper

Ms. Judy Risinger advised that the defendant was a dependable employee and she recalled no problems in his work performance.

Occupational Skills

The defendant is skilled in wood work, electronics, and architectural landscaping.

I. Economic Situation

The defendant is presently earning approximately $145 per week. He claims to have no outstanding debts or monthly rent payments. The defendant is living with a friend, Mr. Roy Ralmuto.

G. Narcotic, Drug, and Alcohol Experience

The defendant first experimented with marijuana at the age of fifteen. Since that time, he related that he has smoked the substance on an "occasional basis", adding, "twice a month at the most". In 1977, the defendant utilized valiums by prescription for approximately one month. He denies other drug usage.

The defendant consumes alcohol to the extent of "a couple of beers twice a week". He explained that he normally drinks when he is "entertaining company". The defendant has one prior arrest as a juvenile for Public Intoxication.

K. Military Experience

The defendant served in the United States Air Force from January 30, 1980 to February 3, 1980, and was honorably discharged.

VI. PLANS

The defendant related his future plans as follows:

"To open a landscape Contract business & maintenance for residnetial [sic] & commercial. Will

be self employed along with a friend who will be backing me Roy Ralmuto.

This will be a very good chance for me to make something out of myself, being self employed. I feel this is a great opportunity for me & I plan to make the very best of it."

The defendant's long range plans are:

"To work hard at my own business venture, to be able to expand if time & money permits.

To earn a fair & honest living & pledge to myself & others who have helped me to walk away from trouble & live a clean, respectable life."

KIM VALENTINE

/s/ Kim Valentine
Investigating Adult
Probation Officer

WILLIAM WERNER

/s/ Wiiliam Werner
Supervisor
Pre-Sentence
Investigation Unit

pa
3/5/81

CAUSE NUMBER 326758

THE STATE OF TEXAS	IN THE 232nd DISTRICT COURT
VS.	OF
BRYAN STUART LANKFORD	HARRIS COUNTY, TEXAS

MOTION TO REVOKE PROBATION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, THE STATE OF TEXAS, by and through the undersigned Assistant District Attorney and shows the court that heretofore on the 10th day of March, 1981, the Defendant herein was adjudged guilty of the offense of ROBBERY a felony, and was granted probation for a period of 10 years in accordance with Section 3 of Article 42.12 of the Texas Code of Criminal Procedure.

Further, the State would show that the Court ordered the Defendant herein to abide by certain conditions of probation during the term of probation and among the conditions of probation ordered by the court were the following conditions of probation:

1) Commit no offense against the laws of this or any other state or of the United States.

The State would further show the said Defendant did then and there violate terms and conditions of his probation by:

(1) On or about April 27, 1983, in Montgomery County, Texas, did then and there unlawfully intentionally and knowingly, while under the influence of intoxicating liquor; drive and operate a motor vehicle upon a public highway.

(2) On or about April 27, 1983, in Montgomery County, Texas, did intentionally flee from DAVID WOMACK, hereafter styled the complaint, a peace officer, lawfully attempting to arrest the defendant, knowing the complainant to be a peace officer.

WHEREFORE, THE STATE PRAYS that Alias Capias issue and upon arrest that a hearing be given the Defendant and that on final hearing the probation be revoked.

/s/ (illegible)
ASSISTANT DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

MOTION GRANTED AS PRAYED FOR and the Clerk is hereby ORDERED to issue Alias Capias for arrest of the Defendant and that a copy of this Motion be served on the Defendant.

SIGNED THIS THE 21st DAY OF June, A.D., 1983

/s/ (illegible)
HONORABLE A.D. Asice, JUDGE
PRESIDING, 232nd DISTRICT COURT
Harris County, Texas

ACTION DIRECTED BY THE COURT
A. Filed Motion to Revoke (initials)
B. No Action Desired ___
C. Hold Pending ___

ATTEST:

RAY HARDY
District Clerk
Harris County, Texas

By: _____
(Deputy)

/s/ (illegible)
JUDGE 232nd DISTRICT COURT

/s/ Mike (illegible)
ADULT PROBATION OFFICER
DATE SUBMITTED ___

SEAL

STATE OF IDAHO
DEPARTMENT OF CORRECTION
Division of Probation and Parole

District #2
P.O. Box 375, 1118 F St.
Lewiston, Idaho 83501

ADDENDUM TO PRE-SENTENCE INVESTIGATION

October 3, 1984

Honorable George Reinhardt
District Judge
Idaho County District Court
Grangeville, ID 83530

RE: Lankford, Bryan
#20157

Dear Judge Reinhardt:

In response to your inquiry regarding the altercation between the defendant, Bryan Lankford, and inmate Kurt Huebner the following is submitted for your consideration.

On September 27, 1984, I interviewed Mr. Huebner at the Idaho County Jail and I interviewed Mr. Lankford at the Lewis County Jail. Mr. Huebner related the following story. "Approximately two nights before Bryan (Lankford) had called the Lewiston Tribune. I heard Mark (Lankford), more or less, trying to talk Bryan into admitting he did the killings and that there was no sense in both of them going down. Bryan replied with no direct answers, but alot of heming and hawing. Later that evening Bryan said he was going to make it public about the murders." Kurt indicates he questioned Bryan as to whether or not he was doing the right thing about letting Mark get away with this. Bryan stated he was going

down anyway and there was no sense in both of us going. According to Mr. Heubner, Bryan appeared very despondent at this time. It was in the next day or so that Bryan had called the Tribune. It did not appear to Mr. Heubner that Bryan cared one way or the other about admitting the murders.

Mr. Heubner transferred to the Alcoholism Treatment Unit (ATU) at Orofino, returning to the Idaho County facility on August 13, 1984. Mr. Heubner next saw Bryan around August 28, 1984, when he returned to the Idaho County facility after his suicide attempt. On September 20, 1984, Bryan and Kurt got into an argument about a woman Vice President and Kurt related to the defendant that he must have a little woman in him. According to Kurt, Bryan jumbed [sic] down from his bunk, "got in my face", and stated, "you better retract that, or you won't live to see tomorrow, or you won't wake up tomorrow". Mr. Huebner cannot recall his exact words. Mr. Heubner did not report the incident to the jailer. On September 23, 1984, the two had another argument, Mr. Huebner does not recall its origin. Bryan again jumbed [sic] down off his bunk and grabbed Kurt by the throat with his right hand. Kurt was seated on his bed. Bryan said something to Kurt, a comment he does not recall. Kurt indicates he was scared and stood up. According to Kurt, Bryan said to him that he was going to meet his maker if you keep it up. Mr. Heubner then struck Bryan Lankford in the face with his left hand. Kurt relates he is sorry he struck Bryan Lankford, "I know he's got enough on his head without this".

I interviewed Bryan Lankford at the Lewis County Jail, September 27, 1984.

Bryan relates on September 23, 1984, he and Kurt were laying in their respective beds watching television. Bryan indicates Kurt reached up and slapped him on the arm in a playful manner. I got down and we exchanged playful blows and for some unknown reason he hit me in the face.

When asked about any previous conversations between himself and Mr. Heubner, Bryan related previously there had been some comments about Bryan being "queer". Bryan relates he had replied, "you better not go to sleep tonight". Bryan indicates he did not mean the comment to be threatening and it was to be taken as a playful comment.

Bryan indicates before he had called the Tribune Mark had been yelling down the hall that the only way he (Bryan) was going to live is if they let Mark out. Mark was prompting Brian [sic] to tell everyone he (Brian) [sic] had killed those people. Mark had related to Brian [sic] that if they let him (Mark) out, it would go easier on Bryan and he would eventually be released. Bryan indicates Mark knows more about the law and Bryan felt what Mark was telling him might be true. Bryan indicates, "I've taken the rap for him before, he's talked me into things before".

Lastly, our conversation got onto the subject of suicide. Bryan indicates he will not do alot of time. Bryan indicated, "if I'm sentenced to something I think is unreasonable I'll end my life". When questioned about what was reasonable Bryan related, "something reasonable, but not 10, 20 and 30 years." This concludes the statements of Mr. Lankford.

Approved:

/s/ Del E. Hansen
Del E Hansen
District Manager

Respectfully submitted,

/s/ John M. Schrader
John M. Schrader
Sr. Probation & Parole Officer

cc: Defense
Prosecutor
File

Idaho County Sheriff Office

Date Sept 23 Page No. ___

STATEMENT OF: Jailer LARRY MENCER
TIME: 2010 hrs
LOCATION:___

At about 2000 HRS on Sept 23 1984 I was in the kitchen and heard yelling coming from cell. Went to cell and open door there was Bryan Lankford and Kurt Heubner, Kurt had his back towards the door Bryan was against the wall facing the door. I yelled for them to break it up at that time Kurt hit Bryan in the face. I then step in side and broke it up. Had both parties set on beds called for Mike Wambodt to help. Then moved Bryan to another cell.

WITNESSES: /s/ Larry G Mencer

Date 9/24/84 Page No. ___

STATEMENT OF: Robert W. Caldwell

At approxamately [sic] 2100 HRS. or a little before. Deputy Jailer Larry M. had gotten me out of my cell, to clean

up a little, and shave. We were talking in the kitchen area, when we heard the sounds of an argument in my cell area. Larry ran over to the cell door, and I could hear him telling them (Kurt Huebner and Brian [sic] Langford [sic]) to knock if off and settle down. But I could hear the argument getting louder. The jailer repeated himself loudly several times for them to settle down. Finally he opened the door, and told them to quit and to set down or he would take a hand in it. When he came back out of the cell, he went and got another deputy to assist him, and took Brian [sic] Langford [sic] out of the cell and put him in #2 tiger cage there was a little blood on Brian's [sic] nose. I remained in the kitchen area.

/s/ Robert W. Caldwell

Idaho County Sheriff Office

Date 9/25/84 Page No. 2

STATEMENT OF: Kurt A. Huebner
TIME: 0830
LOCATION: IDAHO CO. JAIL

At approximately (illegible) hrs, 23 Sept 84, I hit Bryan Lankford with my left hand in the right-center of his face on a couple of occasions, before Mr. Lankford verbally threatened my life and as he grabbed my throat last night I felt a sense of fear and paranoia that make me react very defensive as I am going to be testifying in one of the Lankford Brothers case for reasons unknown to me I had no idea whatsoever if Bryan Lankford knew about this at or before the time of the incident my previous records and personnel contacts will reveal I am not a person who

has a violent history and even I am amazed that I would take a matter like this into my own hands when in all respect I should have notified one of the jailers on this touchy situation.

– END OF STATEMENT – Kurt A. Huebner 24 SEPT 84

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

(Caption Omitted In Printing)

FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER SECTION 19-2515, IDAHO CODE.

The above defendant having been found guilty by a jury of the criminal offense of Murder in the First Degree – Two Counts (I.C. § 18-4003(d)) which under the law authorizes the imposition of the death penalty; and the court having ordered a presentence investigation of the defendant and thereafter held a sentencing hearing for the purpose of hearing all relevant evidence and argument of counsel in aggravation and mitigation of the offense;

NOW, THEREFORE the Court hereby makes the following findings:

1. *Conviction*. That the defendant while represented by court appointed counsel was found guilty of the offense of Murder in the First Degree – Two Counts (I.C. § 18-4003(d)) by jury verdict.

2. *Presentence Report*. That a presentence report was prepared by order of the court and a copy delivered to the defendant or his counsel at least seven (7) days prior to the sentencing hearing pursuant to section 19-2515, Idaho Code, and the Idaho Criminal Rules.

3. *Sentencing Hearing*. That a sentencing hearing was held on October 12, 1984, pursuant to notice to counsel for the defendant; and that at said hearing, in the presence of the defendant, the court heard relevant evidence

in aggravation and mitigation of the offense and arguments of counsel.

4. *Facts and Argument Found in Mitigation.*

(a) Because of the Defendant's age (24) there is a possibility that he could be rehabilitated.

(b) The Defendant smoked marijuana shortly prior to the murders of Mr. and Mrs. Bravence.

(c) The Defendant had a deprived childhood and was abused by his father.

(d) When the defendant is in the company of his brother, Mark Lankford, Mark Lankford is the more dominant of the two.

(e) The defendant is relatively intelligent and has a good command of the English language.

(f) The defendant has the capacity to be employed and is capable of being trained for employment.

5. *Facts and Argument Found in Aggravation.*

(a) The defendant is a dangerous and violent individual.

(b) The defendant has a personality disorder with antisocial features predominant.

(c) The defendant is deceitful and calculatingly manipulative.

(d) The defendant has never held a steady job and associates with undesirable individuals.

(e) The defendant has no significant ties to any community or to any individual.

(f) The defendant's past pattern of living clearly indicates that he will continue a life of criminal activity.

(g) The defendant has a past criminal record, including being adjudged guilty of the offense of Robbery in 1980. The defendant was placed on probation for 10 years for the Robbery offense. The defendant threatened the life of a Safeway clerk with a gun or an object intended to appear like a gun.

(h) The murders of Mr. and Mrs. Bravence were cold blooded and pitiless. The killing was not a product of psychotic behavior but was thought out and schemed.

(i) The defendant has previously failed to comply with a probation which he received for the robbery of the Safeway store.

(j) After the jury verdict of guilty in these cases and while awaiting sentencing, the defendant became involved in an altercation with, and threatened the life of a fellow inmate in the Idaho County Jail.

6. *Statutory Aggravating Circumstances Found Under Section 19-2515(f), Idaho Code.* This court finds beyond any reasonable doubt that the following five statutory aggravating circumstances exist:

(a) At the time the murder was committed the defendant also committed another murder – that is at the time Robert Bravence was murdered by the defendant, he also murdered Cheryl Bravence.

(b) The murders of the Bravences were especially heinous, atrocious or cruel, and manifested exceptional

depravity. The victims did nothing to provoke the defendant who caused their skulls to be viciously and repeatedly beaten until smashed. The beating of Mr. and Mrs. Bravence was accomplished in such a way as to be characterized as extremely wicked and shocking vile. The depravity exhibited by the defendant, in killing Mr. and Mrs. Bravence demonstrated a depravity which obviously offends all standards of morality and intelligence.

(c) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life. The defendant participated in the murder of the Bravences for nothing more than the hopes of obtaining a van and a few credit cards. The theft could easily have been accomplished without having resorted to murder. The murders were cold blooded and pitiless in that the defendant, in a cool, calm, and calculated manner decided, with no provocation whatsoever, to take the lives of this young couple.

(d) The murders were defined as murder of the first degree by Idaho Code Section 18-4003(d) and the murders were accompanied with the specific intent to cause the deaths of Mr. and Mrs. Bravence. After causing the skulls of the Bravences to be smashed in, the defendant and his brother carried the unconscious bodies (dead or near death) into a remote area where they were left dead or to die.

(e) The defendant, by prior conduct and by conduct in the commission of the murders at hand has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

7. *Reasons Why Death Penalty Was Imposed.*

(a) This court finds that the mitigating circumstances which were presented do not outweigh the gravity of the Statutory Aggravating Circumstances listed above as would make the imposition of the death penalty unjust.

(b) The mitigating circumstances which were presented do not outweigh any one of the Statutory Aggravating Circumstances listed above as would make the imposition of the death penalty unjust.

(c) The jury in this case found the defendant to be guilty of two counts of murder of the first degree. The evidence clearly demonstrates and this court finds that the murders were intentionally committed by Mark and Bryan Lankford, each of whom, with the assistance of the other, caused the skulls of a young couple, Mr. and Mrs. Bravence, who were camping on the South Fork of the Clearwater River, in Idaho County, Idaho, to be smashed.

Furthermore, that following said assault Bryan and Mark Lankford loaded Mr. and Mrs. Bravence into the Bravence's camping van and drove them a short distance into the mountains for disposal. The Lankfords carried the non-conscious Bravences into the woods and covered their bodies with brush not knowing whether or not they were dead but knowing full well that if they were not dead that death was inevitable as a result of the condition of their skulls and the fact that they were left unattended in a remote area.

Furthermore, this court finds that the murders were unprovoked. The Lankfords jointly, with malice

aforethought, determined to kill the Bravences for money and for the camping van of the Bravences which carried Texas license plates and Texas registration. Said Texas identification would coincide with personal identification of the Lankfords who resided in Texas. This court further finds that the murders were committed with an abandoned and malignant heart. The lankfords [sic] possessed a shotgun which was held on Mr. Bravence by Bryan Lankford. Mark and Bryan Lankford then caused the skull of Mr. Bravence to be smashed who offered no resistence [sic] whatsoever and who did nothing to provoke the assault. Some time later Mrs. Bravence came to the site where her young husband was lying unconscious. Mrs. Bravence offered no resistence [sic] but went to her husband's side. Then the skull of Mrs. Bravence was caused to be smashed by the Lankfords. This court does not know how many times the head of Mr. Bravence or Mrs. Bravence was struck or with what their heads were struck. However, the blows were multiple in terms of number and tremendous in terms of force. This court does not know how many blows were struck by Bryan Lankford or how many blows were struck by Mark Lankford. The evidence clearly demonstrates and this court finds that both Bryan Lankford and Mark Lankford committed acts of force and violence directly upon the persons of Mr. and Mrs. Bravence which acts directly and proximately caused the deaths of Mr. and Mrs. Bravence. The facts show that either Bryan Lankford or Mark Lankford could have prevented the deaths of Mr. and/or Mrs. Bravence.

The facts clearly show that after the bodies of Mr. and Mrs. Bravence were covered with brush and the

Lankfords had successfully escaped the scene of the beatings – that both Bryan Lankford and Mark Lankford were in a position, without fear of harm from the other, to take steps to notify authorities anonymously or otherwise, of the location of Mr. and Mrs. Bravence on the chance that they may still have been alive. Neither of the Lankfords chose to do so however and instead they partied on the credit cards of the Bravences. They wined and dined themselves and stayed in expensive motels feeling secure and obviously content with their situation. This clearly shows a lack of remorse on the part of Mark and Bryan Lankford which has persisted to date.

The objectives of sentencing are:

(a) Protection of society.

(b) Deterrence (General and Special or Individual).

(c) Rehabilitation.

(d) Punishment or Retribution for wrongdoing.

With reference to the first objective, "Protection of Society", I find specifically that Bryan Lankford is a dangerous individual, that he is a violent individual, that he has a personality disorder with anti-social features predominant. He is dishonest, he is the prince of deceit, he is calculatingly manipulative. Bryan Lankford has floated from job to job and has in the past associated with undesirable individuals. He has no significant ties to any community or any individuals and his pattern of living clearly indicates that he will continue a life of criminal activity. Bryan Lankford was adjudged guilty of Robbery in 1980 and was placed on probation for 10 years. Finally, after being convicted of two counts of 1st degree murder,

and while awaiting sentencing, the Defendant became involved in an altercation with, and threatened the life of, a fellow inmate in the Idaho County Jail.

With reference to the 2nd objective of sentencing, "Deterrence", it should be noted that the plan to kill the Bravences was not a product of passion or psychotic behavior but was thought out and schemed. This Court is thus convinced that the punishment to be imposed will function as a general deterrent to murder. Furthermore, the likelihood of similiar [sic] future conduct is so certain that removal from society is the only method which will successfully deter Bryan Lankford from engaging in similiar [sic] conduct.

The third objective of sentencing is "Rehabilitation". This is the notion that I can do something or order something such that Bryan Stuart Lankford will contribute to, as opposed to detract from, the well being of society. It should be stressed that the defendant was considered for a rehabilitation plan when placed on probation for Robbery. The plan obviously failed. Had Bryan Lankford been placed in prison for Robbery of the Safeway store the Bravences would be alive today. We cannot however fault the Texas judicial system for giving Bryan Lankford a chance to better himself and for giving him an opportunity to prove that he could be a productive citizen. At the time he was placed on probation he had a minor criminal record. He blamed all his troubles on his father's cruel treatment towards him and the bad influence that his brother had on him. Furthermore, his family supported him. Perhaps the reason that our judicial system is credible and viable is because a first time offender who threatens the life of an innocent Safeway clerk can be

placed on probation and given a chance. By the same token however, our judicial system will loose [sic] credibility and viability if we continue to permit the corrupt to terrorize the innocent in our society.

The defendant has shown no remorse for his offenses. He has not cooperated with authorities after his arrest. He has told authorities that he and his brother had nothing whatsoever to do with the death of the Bravences. He has testified that his brother was alone involved in the murders. He has testified (On October 10, 1984 in the companion case, State vs. Mark Lankford, Idaho County Case #20158) that he called the Lewiston Tribune and claimed that it was he alone who murdered the Bravences this he later denied and offered the explanation which is set forth in the addendum to the presentenc- investigation report under date of October 3, 1984 to the effect that it was simply part of a plan that would secure freedom for his brother who could in turn free him.

Suffice it to say that the defendant has failed to take any responsibility whatsoever for his actions. This court specifically finds that the defendant has no capacity for rehabilitation.

The final objective of sentencing is Punishment or Retribution for wrongdoing. This aspect of sentencing is, in essence, an expression of community disapproval for the acts in question. The sentence that I have determined to be appropriate in this case is the least sentence that would not unduly deprecate the seriousness of the crimes in question.

As stated in *State v. Miller*, 105 Idaho 838, 841, "An intentional killing takes from the victim what an offender never can restore – the fragile gift of life. it is the final betrayal of another human being and the ultimate affront to civility. Our courts have no deeper obligation than to express society's condemnation of this act."

It is the opinion of this Court after much considered thought and soul-searching that the only way to protect society is to order, and this court does order that the defendant be sentenced to suffer the punishment of death for the murder of Captain Robert Bravence and his wife, Mrs. Cheryl Bravence.

CONCLUSION

That the death penalty should be imposed for the capital offenses of which he was convicted.

Dated this 15th day of October, 1984.

/s/ George Reinhardt
GEORGE REINHARDT
District Judge

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

(Caption Omitted In Printing)

JUDGMENT AND SENTENCE

The above entitled matter came on to be heard before the Honorable George Reinhardt, one of the Judges of the above entitled Court, on Monday, October 15, 1984. The Plaintiff, State of Idaho, was represented by Dennis L. Albers, Prosecuting Attorney for Idaho County, Idaho; the Defendant was personally present in court and was represented by Joan Fisher, Attorney at Law.

WHEREUPON, the presentence report previously ordered having been filed herein, and the Court having ascertained that the Defendant had had an opportunity to read said report, and all parts thereof, and the Defendant having been given an opportunity to explain, correct, or deny parts thereof, and the Court having heard the same as well as having heard testimony and argument in mitigation and aggravation pursuant to Idaho Code Section 19-2515, and the Defendant at such hearing having advised the Court that he had no legal cause to show why judgment and sentence should not be pronounced against him, and the Court thereafter having entered Findings of the Court in Considering Death Penalty Under Section 19-2515, Idaho Code, the Court did then pronounce its Judgment and Sentence in accordance with said Findings and as follows:

With respect to the charges stated in the Information on file herein, and pursuant to the verdicts of the jury

rendered herein which by reference are incorporated herein,

IT IS HEREBY ORDERED, AND IT IS THE JUDGMENT OF THIS COURT THAT YOU, BRYAN STUART LANKFORD, ARE GUILTY OF TWO COUNTS OF THE CRIME OF MURDER IN THE FIRST DEGREE as charged in said Information and as found by the unanimous verdict of the jury; and,

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that you be, and you hereby are, sentenced to suffer death in accordance with the provisions of Idaho Code Section 18-4004 and in the manner prescribed by Chapter 27 of Title 19, Idaho Code, at the Idaho State Penitentiary, Boise, Ada County, Idaho.

IT IS HEREBY FURTHER ORDERED that you be, and hereby are, remanded to the custody of the Idaho County Sheriff, there to be held until such time as demand is made for delivery to the duly authorized guard of the Idaho State Department of Corrections and for transportation by said guard to the said Idaho State Penitentiary.

ENTERED at Grangeville, Idaho County, State of Idaho, this 16th day of October, 1984.

/s/ George Reinhardt
GEORGE REINHARDT
District Judge

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR IDAHO COUNTY

BRYAN STUART LANKFORD,	)	Case No. 21327
Petitioner,	)	PETITION FOR POST-CONVICTION RELIEF
vs.	)	
STATE OF IDAHO,	)	
Respondent.	)	

COMES NOW, Petitioner, and for his cause of action pursuant to I.C.R. 57 and I.C. §19-4901 et seq. alleges as follows:

I.

That Petitioner is in custody and detained at the Idaho State Correctional Institution in Boise, Idaho.

II.

That the court which imposed judgment and sentence upon Petitioner is the District Court of the Second Judicial District of the State of Idaho, in and for the County of Idaho, the Honorable George Reinhardt presiding.

III.

That the case number in such Court was Idaho County No. 20157 and the offense for which sentence was imposed was Murder of the First Degree, Two Counts, (§18-4003 (d))

IV.

That sentence was imposed on October 15, 1984 and terms of such sentence were that the Petitioner suffered death in accordance with the provisions of Idaho Code Section 18-4004 and in the manner prescribed by Chapter 27 of Title 19, Idaho Code, at the Idaho State Penitentiary, Boise, Ada County, Idaho.

V.

That a finding of guilty in such case was made upon a plea of NOT GUILTY, and jury trial and based upon and pursuant to a unanimous verdict by a jury and judgment rendered thereon.

VI.

That Petitioner files this Petition pursuant to Idaho Code §19-2719(3) and prior to filing his Notice of Appeal appealing from said judgment of conviction and imposition of sentence, and Petitioner contemplates both will be timely filed and pursued in accordance with the provisions of Idaho COde [sic] §19-2719(1).

VII.

That the Petitioner's grounds upon which this application for post-conviction relief is based are as follows:

(a) That Petitioner's conviction was in violation of the Constitution of the United States and the Constitution and laws of this state as a result of:

(1) inadequate and incompetent assistance of court-appointed counsel;

(2) the trial court's failure to appoint competent counsel in a timely fashion prior to trial and pursuant to Petitioner's request;

(3) trial court's failure to order psychological evaluation pursuant to Idaho Code §18-207(c) and relating to defendant's state of mind at the time of offense;

(4) trial court's failure to suppress, *sua sponte*, the testimony of FBI agent Dennis Ploeger regarding incriminating statements made by Petitioner following arrest and after charges of murder were filed against Petitioner and which statement was made without assistance of counsel and without a knowing, intelligent and voluntary waiver of petitioner's right to assistance of counsel;

(5) trial court's failure to suppress, *sua sponte*, any use by the prosecutor of a transcript of a statement made by Petitioner under duress, coercion and mental incompetency, to impeach Petitioner's testimony at trial and without assistance of counsel or constitutionally valid waiver thereof.

(b) That the sentence imposed was in violation of the United States Constitution and/or the Constitution and laws of the State of Idaho as a result of:

(1) trial court's failure to give Notice to the Petitioner of its intention to impose the sentence of death in spite of the Prosecutor's Notice that the State would not seek the Death penalty.

(2) the trial court's refusal to allow the jurors to be qualified or questioned in regard to

their opinions, attitudes and feelings toward the death penalty.

(3) the trial court's reliance in determining findings of fact in support of aggravation on hearsay information contained in a presentence investigation report addendum dated October 3, 1984 and received by Petitioner's attorney on October 10, 1984 without allowing seven days notice pursuant to Idaho Criminal Rules 33.1 to allow Petitioner's attorney sufficient time to determine whether said information was true and correct or whether corrections, additions or deletions should be made;

(4) the trial court's use of testimony by Petitioner at a hearing on a Motion for New Trial filed by Mark Henry Lankford, Case No. 20158 to support findings in aggravation in contravention to the Court's approval of immunity and Order that said testimony would be used for no other purpose;

(5) the trial court's failure to grant petitioner a new trial on the grounds of ineffective assistance of counsel and thereby denying Petitioner his right to allocution at the time of sentencing without jeopardizing his claim of ineffective assistance of counsel and waiving his constitutional objections to use of statements previously made due to ineffective assistance of counsel, and his right not to incriminate himself as provided in the United States Constitution and constitution and laws of the State of Idaho;

(6) the trial court's reliance on unsworn statements of a cellmate of Petitioner contained in a Presentence Investigation report to support a finding of fact in aggravation

without providing Petitioner his right to cross-examine said witness;

(c) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence, namely;

(1) that Petitioner engaged in continuous use of drugs, namely marijuana and mandrex (methaqualone) prior to the events leading to the offenses;

(2) that the effects of said drugs are such as to significantly or wholly impair petitioner's ability to (i) form the requisite intent necessary for first degree murder (ii) resist the overpowering influence and control of Mark Henry Lankford, (iii) to voluntarily, knowingly and intelligently waive either his right not to incriminate himself or his right to counsel at any critical stage of the proceedings;

(3) that facts surrounding the pretrial statements were such as to render the statements illegal and unconstitutional;

(4) the results of polygraph examination by Bud Mason show the defendant was truthful on the lack of participation in or knowledge of the killings (copy attached hereto and marked Exhibit C-1);

(5) that the extent of pretrial publicity and prejudice against Petitioner was such that Petitioner could not receive a fair trial in Idaho County.

(6) that Petitioner contrary to the findings of the trial court was in fact cooperative with law enforcement officials from the time of his arrest and through the trial of co-defendant Mark Henry Lankford as exhibited by:

(i) execution of consent form

(ii) statements made by Petitioner to law enforcement officials

(iii) submission to a polygraph examination pursuant to request by Prosecutor Dennis Albers and Idaho County Sheriff's officers Roger Laughlin and Randy Baldwin

(iv) testimony of Petitioner at trial of co-defendant Mark Lankford, Case No. 20158 as reflected in the records of said case;

(7) the Petitioner's testimony at trial of Petitioner and the trial of Mark Henry Lankford was the result of pretrial statements previously made and the advice of counsel.

(8) that Petitioner, contrary to finding of facts by the court, repeatedly expressed remorse for the events which led to the deaths of the Bravences as evidenced by a taped statment [sic] made of conversation with law enforcement officials, which tape is believed to be the in [sic] possession of the State and will be produced by discovery means available to Petitioner under this action.

VIII.

That prior to this application Petitioner has not filed with respect to the above mentioned conviction any petitions for habeas corpus or any other petitions, motions or applications in this or any other state or federal court.

IX.

Petitioner's court appointed counsel's representation of Petitioner was inadequate and incompetent in the following manner among others:

(a) Petitioner's trial counsel made assurances to Petitioner that if he testified he would receive a life sentence. Petitioner's counsel did not discuss the possibility that Petitioner could be sentenced to death except as an underlying possibility if Petitioner failed to testify against co-defendant Mark Henry Lankford,

(b) Petitioner's trial counsel failed to discuss with Petitioner any defenses such as insanity, intoxication, coercion and duress.

(c) Petitioner's trial counsel failed to ask the court for a court-ordered psychiatric examination except after conviction upon Petitioner's pro se motion.

(d) Petitioner's trial counsel failed to interview prosecution witnesses.

(e) Petitioner's trial counsel failed to spend adequate time consulting with petitioner about the facts necessary for the state to prove in order to establish their case beyond a reasonable doubt i.e., counsel failed to discuss the nature of the charges against petitioner with Petitioner.

(f) Petitioner's trial counsel failed to spend adequate time consulting with Petitioner regarding the effect of Petitioner's pretrial statements and trial testimony as a result of which Petitioner was unaware that his pretrial statments [sic] were suppressible and that his trial testimony resulted in his waiver of Petitioner's right not to testify against himself and to put the State to its burden of proving each and every element beyond a reasonable doubt.

(g) Petitioner's attorney failed to move to suppress any statements made to law enforcement officials though they were suppressible under the 5th and 6th Amendments of the United States Constitution and the Constitution and laws of the State of Idaho and both were used to obtain the present conviction.

(h) Petitioner's attorney failed to familiarize himself with the applicable law necessary to adequately represent Petitioner, including:

(1) distinction in legal sufficiency to support a conviction of second degree murder under the felony murder rule and the intent requirement to support a conviction for first degree murder;

(2) intoxication as defense to intent requirement of first degree murder and as matter in mitigation;

(3) suppression of illegal statements under 5th and [sic] amendment and 6th amendment of United States Constitution, and Idaho Constitution.

and lack of presentation of the same resulted in Petitioner's conviction of first degree murder.

(i) Petitioner's trial attorney failed to insure that defendant could receive a fair trial in Idaho County, when he knew or should have known that significant pretrial publicity had occurred and knew or should have known the reaction of the rural community to the offenses with which Petitioner was charged. Specifically, trial counsel failed to adequately prepare and investigate for adequate jury selection by

(1) failing to move for change of venue,

(2) failing to request funds for and to conduct a community survey,

(3) failing to introduce evidence of pretrial publicity.

(j) Petitioner's attorney failed to insure a fair and impartial jury by moving for individual sequestered voir due, [sic] knowing Petitioner was charged with a capital offense and knowing there had been substantial pretrial publicity.

(k) Petitioner's attorney failed to adequately insure a fair and impartial jury by failing to challenge the composition of jury and failing to investigate the factual basis necessary to sustain such a challenge.

(l) Petitioner's trial counsel failed to conduct an adequate voir dire to enable him to determine whether a juror was excludable for cause or to intelligently exercise his peremptory challenges.

(m) trial counsel failed to question potential jurors on the penalties of life or death upon conviction of first degree murder, or on the jurors' attitudes, opinions and beliefs regarding capital punishment.

(n) trial counsel failed to request funds or to engage the services of an investigator to aid and assist him in the investigation of state's case or in locating defense witnesses and interviewing state and defense witnesses.

(o) trial counsel failed to conduct such an investigation without such aid.

(p) trial counsel failed to request a psychological evaluation to determine the Petitioner's state of mind at

the time of offense though he clearly had facts before him to compel such an investigation, *i.e.*, Petitioner's obvious state of mental distress prior to trial and Petitioner's representations to him of continued use of drugs and inability to resist the domination and control of Mark Henry Lankford.

(q) trial counsel failed to move for and have conducted either prior to trial or sentencing a complete physiological examination to determine whether there was any physiological disorder to provide an explanation for his client's conduct and to ensure appropriate sentencing.

(r) trial counsel failed to request appropriate jury instruction on matters vital to Petitioner's defense, namely, intoxication and coercion and duress though evidence of said issues were presented to the jury.

(s) trial counsel failed to be sufficiently familiar with the facts of the case to enable him to effectively represent Petitioner by adequately presenting the facts in a light most favorable to Petitioner;

e.g. trial counsel failed to be sufficiently familiar with the statement to Idaho County Sheriff's office to diminish the impact of the prosecution's efforts to impeach the Petitioner's testimony. Affidavit herein contains a complete copy of the transcript of said statement and clearly shows that Petitioner never stated he participated in any way in the transporting of the bodies and further shows the parties questioning Petitioner never believed Petitioner to have stated otherwise. Exhibit ___ further shows petitioner's obvious state of distraction and mental distress at the time of making the statment [sic] and the manipulation by Laughlin and Baldwin in obtaining the statement, all of which would

have aided the jury in determining Petitioner's credibility.

(t) trial counsel failed to call available witnesses to corroborate Petitioner's testimony as to intoxication and coercion and duress and credibility though trial counsel was aware of at least the following:

(1) Bud Mason;

(2) Mary Lankford;

(3) Margaret Case

(4) Judy Risinger

(5) Gretchen Mauer

(u) trial counsel failed to request that the matter of punishment be submitted to the jury in accordance with defendant's constitutional right to jury trial and I.C. §19-1902

(v) trial counsel failed to adequately prepare or investigate any matters in mitigation and preparation for sentencing though counsel had from the 31st day of March, 1984 until the 10th day of Ocotber, [sic] 1984 to do so, and all efforts made prior to appointment of new counsel were made by Petitioner himself.

(w) trial counsel failed to cooperate with newly appointed counsel, Joan Fisher, in preparation and investigation for Petitioner's sentencing and post trial motions by refusing to return phone calls and correspondence and failing to provide subsequent counsel access to his files.

(x) trial counsel failed to adequately research pertinent issues of law necessary and in fact had only one issue research which request for said issue was made by

leaving a message on University of Idaho message line on March 19, 1984 (one week prior to trial) and mailed by law student Lois Fletcher to Mr. Longeteig on or about March 21, 1984. Petitioner's attorney did not advise Petitioner of any other question of law which might be raised or which said attorney was researching.

X.

That such affidavits and supporting documents as could reasonablly [sic] be acquired to support the factual allegations stated herein are attached hereto; that Petitioner verily believes additional and substantial evidence exists to support the allegations stated hrein [sic] which can be acquired by granting Petitioner Investigative Funds and allowing petitioner to utilize the discovery devices available under the civil rules of procedure namely, depositions, requests for admission, interrogatiories [sic], Motions to Produce, subpoenaes [sic] duces tecum, Motion for psychiatric and physical examinations.

XI.

That Petitioner is indigent and asks the court for these proceedings to be conducted at county expense and that the Court retain appointed counsel for the Petitioner for purposes of this action also at county expense; that petitioner's original affidavit of indigency is still on file with this court and that a current affidavit is attached hereto.

WHEREFORE, the petitioner prays for the following relief:

1. That the Petitioner be declared indigent; that the court retain and re-appoint previously appointed counsel Joan Fisher for these proceedings at county expense; and that all proceedings herein be at county expense.

2. That the judgment of conviction entered in the case of *State of Idaho v. Bryan Stuart Lankford*, Idaho County No. 20157 on the 15th day of October, 1984 be vacated and a time set so the [sic] Bryan Stuart Lankford may appear and plead anew.

/s/ Joan Fisher
FITZGERALD, SIMS & FISHER
By Joan Fisher,
Attorney for Petitioner

STATE OF IDAHO)
) ss.
Ada County)

I, Bryan Stuart Lankford, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing petition; that I know the contents thereof, and that the matters and allegations therein set forth are true to the best of my knowledge and belief.

/s/ Bryan S. Lankford
Bryan Stuart Lankford

SUBSCRIBED AND SWORN to before me this 20 day of November, 1984.

/s/ Joan Fisher
Notary Public for Idaho
Residing at Genesee therein

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, COUNTY OF IDAHO

[EXCERPT FROM TESTIMONY OF WILFRED W. LONGETIEG AT HEARING ON PETITION FOR POST-CONVICTION RELIEF PETITION, BRYAN STUART LANKFORD VS. STATE OF IDAHO, HELD ON JUNE 24, 1985]

[TRANSCRIPT PAGES 132-142]

(Caption Omitted In Printing)

* * *

[MR. BOOMER] Q Other than your efforts with the jury, which you indicated did not work in this instance, to show that Bryan, I guess, simply participated in the robbery and was an accessory after the fact; did you have any other goals in mind as far as ultimate sentencing, if that should become necessary?

[MR. LONGETIEG] A Well, yes, I think that's one of the things that Bryan Lankford – or why he was maybe dissatisfied. I think he wanted me to assure him that after the trial, he was going to walk out free-as-a-bird. I told him, I said: Don't be so unrealistic, you're going to be convicted of something. So, I assumed right from the beginning that we had better aim towards sentencing, and hopefully, was going to be a more limited than what it was.

Q What was your strategy with respect to aiming towards sentencing?

A Well, I was tying in with the trial strategy of trying to be open and honest and trying to turn the – blame it on Mark and minimize Bryan's participation and

hope for an accessory. It's the same thing, regardless of what he's convicted of; distress, cooperation and remorse right from the start.

Q Were you successful in that respect?

A Well, I didn't handle the sentencing, I was relieved of my duties prior to that time. Had I not been, it would have been my suggestion to continue that course of conduct and have Bryan testify at the sentencing hearing.

Q Did Bryan, in fact, testify at the sentencing hearing?

A If I recall, he did not.

Q In your view, how did that affect the strategy that you had been maintaining up until the time of sentencing?

MS. FISHER: Your Honor, I'm going to object to that because that goes to the court's sentencing. Mr. Boomer asked Mr. Longeteig how the failure of Bryan to testify would affect your sentencing and I don't think Mr. Longeteig is qualified to answer that question.

THE COURT: Well, as I understand it, the question was attempting to ilicit [sic] whether or not change of counsel resulted in a change of tactics, insofar as he is aware.

MR. BOOMER: That was the point of the question.

THE COURT: Objection is overruled. You may continue.

A I naturally have no idea whether the result would have been different, but I would have hoped so, and it was a change of strategy, it was inconsistent with what I had planned.

Q Did Bryan do anything else on his own, prior to sentencing, that was inconsistent with what you had planned?

A Well, yes –

MS. FISHER: I'm going to object to him testifying in that regard.

THE COURT: In what?

MS. FISHER: In that regard; I'm going to object to him testifying to things that he doesn't have personal knowledge of.

THE COURT: Since I have no idea what is about to be testified to, I'm going to permit it and in the event that you think you would like to press your objection, you can ask for a motion to strike.

MR. BOOMER: Perhaps I can back up, too, your Honor, and ask an additional foundational question.

THE COURT: That's fine.

BY MR. BOOMER:

Q The strategy that you discussed with the court here today, did you also discuss that with Bryan Lankford?

A Yes.

Q How did this take place, I mean, did you just sit down and all of a sudden come in one day and say: "Okay, this is our strategy."?

A It kind of evolved as we went along.

Q Was it your impression that he was well aware of what strategy you were trying to formulate?

A I certainly told him; he was at the time.

Q After his trial and before his sentencing, did Bryan do anything, or things, that deviated from that strategy, in your opinion – other than, what you have indicated about testimony at sentencing?

A Yes.

MS. FISHER: I'm going to ask that he confine his response to his personal knowledge, your Honor.

A I have no personal knowledge of the incident that sticks in my mind, no.

BY MR. BOOMER:

Q All right. I would ask that, knowing this is subject to objection, I would ask that things you became aware of that were inconsistent with your strategy?

MS. FISHER: And I will object again, your Honor.

THE COURT: Again, I'll let this come in and I'll entertain a motion to strike. Go ahead, Mr. Longeteig, you may proceed.

A I was informed that Mr. Lankford had made a statement to the press unbeknownst to me and it occurred while I was out of town. It was a phone call to

the Tribune, made a statement that was completely a reversal of what his trial testimony was and everything else that he had said up to that point. In effect, taking the blame upon himself and off of Mark.

MS. FISHER: At this time, your Honor, I'll move to strike that. There's been no testimony of that in the record in Bryan Stuart Lankford's case, and I believe the court acknowledged that they would not take anything into consideration for sentencing. That was outside the case of Bryan Stuart Lankford, and consequently, it's –

THE COURT: Was that particular matter referred to in the presentence investigation report?

MS. FISHER: No, your Honor.

THE COURT: Was it referred to in Mark Lankford's case?

MS. FISHER: It was with the understanding that the Court was not going to consider anything from Mark Lankford's case to arrive at sentencing.

THE COURT: And who made those statements . . . I mean, did Bryan Lankford testify –

MS. FISHER: Bryan testified under the immunity and statement by the Court that it wouldn't be used for any –

THE COURT: All right, perhaps it would be better, then, Mr. Boomer, to put that into a hypothetical, assuming that that was true, would that have been inconsistent, and then the state will take a . . .

MR. BOOMER: Well, your Honor, I realize that –

THE COURT: – we'll take judicial knowledge of what occurred in Mark Lankford's case relative to Bryan Lankford's testimony, and then Mr. Boomer can ask him a hypothetical: If that were his testimony, would that have been inconsistent?

MS. FISHER: Your Honor, is it the Court's statement that you took into consideration for sentencing?

MR. BOOMER: Your Honor –

THE COURT: No, what we're doing is, this is a post conviction relief hearing, Counsel, and I just deliniated [sic] how I'm going to permit this question to be answered. Now, it can be placed in hypothetical form, Mr. Boomer, if you wish.

MR. BOOMER: Very well.

THE COURT: If you wish to do that, you may proceed.

MR. BOOMER: Your Honor, perhaps I should explain to the court my purpose, and I know where Ms. Fisher is coming from because this is certainly in the record that this was not considered in Bryan's case. The point that I'm trying to inquire, and the reason I feel it's relevant is to point out to the court whether or not Mr. Bryan Lankford was following his own attorney's recommendations after the trial. I offer it, I guess, for that purpose.

MS. FISHER: There's never been any evidence that Mr. Longeteig did in fact advise Mr. Lankford in anything in regard to post conviction.

MR. BOOMER: Well, my understanding of the witnesses [sic] testimony was that he said just that, that they had discussed it and Bryan was well aware of it.

THE COURT: Both of you, just talk to me.

MR. BOOMER: Okay, I'm sorry.

THE COURT: You may proceed. Why don't you ask the question, Mr. Boomer.

MR. BOOMER: All right.

BY MR. BOOMER:

Q Mr. Longeteig, hypothetically assuming that, for instance, that Mr. Bryan Lankford, after his conviction, but before sentencing, had made a phone call to the Lewiston Morning Tribune and had informed them of a completely different story than that which he testified to on the stand, in essence taking all the blame upon himself and exonerating his brother, Mark. Would that have been inconsistent with your strategy that you had formulated and developed with Bryan Lankford?

A Certainly.

Q Did you discuss sentencing with Mr. Bryan Lankford after his conviction?

A Discuss what, the inconsistent statement or the need to be consistent?

Q Well, let's – I take it that you did discuss sentencing with Bryan Lankford?

A Yes, after the jury rendered his verdict, that was the basic topic of conversation from then on.

Q Did you discuss with him any inconsistent statement that he made after sentencing? Any specific statement that he made after sentencing?

A Well, the first time we got into that was when he was due to testify at Mark's trial. He was reluctant to do so, he didn't want to, I could see a lot of reasons why he didn't want to. But, I expressed on him that I thought it was important that he be consistent and be cooperative, that's about all he had to sell at this point, and urged him to testify at Mark's trial. I think that's the first time that sort of conversation came up.

Q Were there other instances when that sort of conversation came up.

A Well, it was after the statement to the – been reported to me that there had been statements made, I think I phoned him immediately upon learning about it. I think it was the evening, maybe a Friday evening or something, because I had been out of town for a couple of days on a trial to northern Idaho, and I had just come driving in and I had several phone messages stacked up, that something was happening. So, I ascertained what had gone on and I called Bryan and said: What's going on, is that true? And he said: No. And I said: Well, just calm down and we'll talk about it.

Q What did you advise him with respect to making any inconsistent statements at that point?

A Well, at that point, I said: Don't go calling anybody or talking about this until we discuss it. Next time we discussed it, he said: I didn't know why I said it, I get

to feeling bad, but that is true. He said: What I've been telling you all along has been true.

Q Did you attempt to discuss any other sentencing matters with Mr. Bryan Lankford prior to his sentencing?

A Yes; it was shortly after this that he started having real difficulties, both in the Idaho County jail and in the NezPerce County jail – or Lewis County jail in NezPerce.

Q Was he, in fact, housed in the NezPerce County jail?

A He was for a time, and then he was taken to a security cell in Boise for psychiatric treatment. I'm trying to remember the time period, I believe, there had been an order entered to do that for evaluation purposes, and another time, it was done because he was having some difficulties with himself. That's when things broke down and during that time period, I attempted to talk to him about sentencing and he didn't want to discuss it very much.

Q What did he discuss with you if he wouldn't discuss sentencing?

A Well, as an example a meeting in NezPerce, I told him: Bryan, we've got to get serious about talking about who we want for sentencing, as witnesses, whether we want them in live testimony, take depositions in Texas, affidavits, maybe, by stipulation. There were a number of alternatives that we were exploring at that time. He said: Just get me out of this NezPerce jail, I can't stand it. I just couldn't get him to respond to anything that bore on sentencing position.

Q How long prior to the sentencing was it that Ms. Fisher became co-counsel in this case, if you recall?

A I don't remember the exact date, whatever the court records show.

Q Okay. And after that point, did you have any direct contact with Bryan Lankford or Ms. Fisher?

A I think within the next day or two, once at the most, and that was it.

Q Were you officially Bryan Lankford's counsel of record at the time of sentencing?

A I never did quite understand my status. He didn't want to talk to me, Ms. Fisher didn't want to talk to me and the court ordered me to stand by and be available for questions, and so, I was.

Q So, you didn't have primary responsibility at the time of sentencing?

A No, I had no input at all.

Q Had you been – granted, hindsight is always twenty-twenty – had you been counsel for Bryan Stuart Lankford at the time of sentencing, how would you have approached the sentencing procedure?

A I would have certainly repaired whatever damage had been done by the Lewiston Tribune statement, and gone on with the original plan.

Q Which was?

A cooperation, remorse, trying to show that he was a rehabilitated individual, rehabilitatable individual, and

I think, it was a mistake that he didn't, but this is only speculation, that he didn't testify at his sentencing.

Q Why do you feel that was a mistake?

A It was inconsistent to his prior position, I felt, jeopardizing his credibility to a certain extent.

Q What was your view – nearly done, Mr. Longeteig – what was you view of the status of the evidence against Bryan Lankford, minus the admission that he had made to Agent Phloeger, the admissions that he had made to Randy Baldwin and Roger Laughlin?

A My view is that, it would have gone to the jury, that there had been no sufficient evidence to overcome a motion to dismiss.

Q There would be insufficient evidence?

A Would have been insufficient evidence?

Q Okay.

A It would have gone to the jury, that they would have convicted him on that evidence without his original story before them. They would have no choice but to convict him on first-degree, and we felt we had a reasonable chance to get him something else other than first-degree, and that was the way to go.

* * *

[EXCERPT FROM TESTIMONY OF PROSECUTING ATTORNEY AT HEARING ON PETITION FOR POST-CONVICTION RELIEF IN BRYAN STUART LANKFORD VS. STATE OF IDAHO HELD ON JUNE 24, 1985]

[TRANSCRIPT PAGES 213-215, 217-219]

* * *

[MR. BOOMER] Q Mr. Albers, would you describe, in general, your observations of how Mr. Longeteig approached the defense of Bryan Lankford in the case?

MS. FISHER: Objection, your Honor, it's irrelevant.

THE COURT: Overruled.

A I thought in all ways, it was appropriate. It was generally one of a cooperative situation, I guess, the impression that they were trying to put on was one of the defendant cooperating as much as possible in order to get the best type of arrangement, if he were convicted.

Q Did you make any recommendations with respect to the sentence of Bryan Lankford?

[MR. ALBERS] A Yes.

Q And that was that recommendation, if you recall?

A Never been satisfied that it was clear to the record, but what I intended was that he have a sentence which would result in twenty years in the penitentiary. The way I thought that that could be done would be two indeterminate life sentences running consecutive.

Q When did you finally conclude what your recommendation would be?

A I came to a conclusion after I made a phone call to Detective Dudley Barney (Ph) of the LosAngeles Police

Department, and that would have been after Mark Lankford's conviction, but before the sentencing. I talked to him to see what he felt about the circumstances in view of his experiences with murder cases he's been involved with in LosAngeles.

Q Other than that conversation with Detective Barney, can you tell us what factors went into your decision to recommend back to back indeterminate life sentences for Bryan Lankford?

A The thing that was most important in my view was the testimony of the psychiatrist, Dr. Estes and the final decision was made after his testimony and that came as a result of there being people aging to age forty-five or thereabouts, that that changes the way that they act. That, coupled with the things that Bryan's own family said about him and his own brother, Robert, having said about him, those things all came together and my feeling was that after twenty years, he would be a different person.

Q What affect, [sic] if any, did Bryan's cooperation have to do with your recommendation?

A It had some affect [sic] and that's why I called Dudley Barney, to find out how they treat people who did cooperate to some extent. Bryan seemed open in so far as what he was going to testify and what he was going to do and that tended to have a negative effect on me, that he was not all that stable and he needed a more structured time . . .

Q You did take that into consideration?

A Yes.

Q It was a factor in recommendation, not to recommend the death penalty?

A That's correct.

* * *

Q Mr. Albers, did you, at any time, enter into discussions concerning plea negotiations with Mr. Longeteig?

A Yes.

Q Concerning this case?

A Yes.

Q Can you tell us about when these took place?

A They began –

MS. FISHER: Your Honor, I'll object simply on the grounds of repetition; it's in the motion for a new trial and you have taken judicial notice of that.

THE COURT: Well, perhaps there's something he is getting at that's not in there, so we'll give him a little leeway. You may proceed, Mr. Boomer.

BY MR. BOOMER:

Q These occurred after the preliminary hearings?

A Yes, but during that proceeding, Roy Ralmuto was still in the Grangeville area, that's when we began talking about pleading negotiations.

Q Can you tell us how this took place and what took place?

A As I recollect, it was my worry that without Bryan Lankford's testimony convicting Mark Lankford, it might be difficult in view of his not having any – not having handled the credit card in any fashion, other than, one handwriting sample which was a difficult question.

Q Are you saying the circumstantial evidence appeared be [sic] stronger against Bryan than Mark?

A It was far stronger, plus his admissions, and I felt that I wanted to be convinced as I could be about the truthfulness of the statements that he had given to Mr. Phloeger and to the deputy, Sheriff Deputy Baldwin. So, I additionally made the offer that if he could substantially pass two polygraph examinations, as to the truthfulness of his statements, then I would follow through with my recommendation for an indeterminate life sentence and that in my mind, at that time, would be one indeterminate life sentence.

Q And what happened, ultimately, with respect to that?

A Ultimately, he took two polygraph tests, he didn't pass all of them, but as to what I thought were the critical questions, and that basically was: Did you hit the Bravences, did you participate in the actual destruction of their bodies? He passed those questions as to both polygraphs.

Q Based upon that, what did you do – well, excuse me, just for foundation: This was something that you worked on together with Mr. Longeteig, as counsel?

A Yes; that was one of the principal discussions this night at Craigmont, that I stopped to talk with him on.

Q Upon receiving those results of the polygraph examination, what if anything, did you and Mr. Longeteig do?

A We then contacted the court, Judge Reinhardt, and made this offer to see whether or not the court would accept – Mr. Longeteig wanted to try to bind the court as much as he could.

Q Certainly. Did the court agree to be bound by any such agreement?

A No.

Q Based upon that, what then happened?

A We went to trial in Bryan's case.

MR. BOOMER: I have nothing further.

THE COURT: Cross?

MS. FISHER: Thank you, your Honor.

* * *

[EXCERPT OF TRIAL JUDGE'S FINDINGS AT HEARING ON PETITION FOR POST-CONVICTION RELIEF IN BRYAN STUART LANKFORD VS. THE STATE OF IDAHO MADE ON JUNE 26, 1985.]

[TRANSCRIPT PAGES 244-253]

* * *

[COURT] A review of the record demonstrates that petitioner was arraigned on October 20, 1983, and advised of the right to hire a lawyer, as well as, his right to have a lawyer appointed to represent him at no cost to him, in the event he couldn't hire a lawyer. At that time, the petitioner stated he wasn't certain whether he would attain private counsel or ask for a public defender. The magistrate then told him that he would be free to use the phone to call his family and try to hire a lawyer. The magistrate Judge also told him that if he couldn't get a lawyer, tell the jailer and then a hearing would be held. On October 24, 1983, the petitioner again appeared in front of the magistrate. He was informed, again, of his right to have counsel and was asked if he wanted one. Bryan Lankford advised the court that he was not going to do anything about hiring a lawyer. The court tried to talk him into getting counsel because his preliminary hearing was fast approaching. The court told him that the court was afraid that his rights would not be adequately protected. Bryan Stuart Lankford insisted with his indifference to hiring counsel, so the court then offered to appoint a public defender to help him find a lawyer, if not to represent him on the case as a whole. The next day, on October 25, the court appointed Mr. Longeteig to represent Mr. Lankford. Now, due to Mr. Lankford's failure to hire counsel or accept the court's offer of free

counsel at a earlier date, his new lawyer, Mr. Longeteig, consented to a continuance of the preliminary hearing so that he would be better able to prepare and represent his client.

Mr. Lankford was represented by Mr. Longeteig at the preliminary hearing and Mr. Lankford was bound over to the District Court. Mr. Longeteig continued to represent Mr. Lankford for the next five months and there were no apparent problems. However, as the trial date approached, this court received a letter from Mr. Lankford under date of March 10, 1985 [sic], stating that he was having difficulties with his counsel. This court mailed a copy of that letter to Mr. Longeteig and immediately scheduled a hearing so that the problem could be examined. At that hearing, Mr. Lankford advised the court that he had an opportunity to discuss his differences with Mr. Longeteig, that they had resolved their differences and that he was not requesting another lawyer. At that time, had this court relieved Mr. Longeteig of his duties, it would have been unfair and inappropriate and most importantly, it would have violated Mr. Lankfords right to counsel. No further complaints were voiced until after the trial. Bryan Stuart Lankford was convicted of first-degree murder at that trial. And then, on June 28, 1985, Mr. Lankford wrote the court a letter and requested new counsel. The court mailed out copies of the letter and conducted a hearing to examine the problem once again. The hearing was held on 7-9-84, at that time, Mr. Lankford advised this court that he was upset with the procedure used in the Idaho County jail, he was upset with his jailer and with the lack of communication with himself and Mr. Longeteig. He advised this court that he and

Mr. Longeteig would attempt to resolve their differences and he was going to try and hire independent counsel to work along side Mr. Longeteig. As sentencing approached, Mr. Lankford filed a document entitled: Motion to Dismiss Counsel and Overturn Conviction. After Mr. Lankford was returned from the Idaho State Penitentiary where he was undergoing psychological evaluation for sentencing purposes, a hearing was held on that motion. This court then, once again, examined the problems voiced by Mr. Lankford. Mr. Lankford advised the court that he didn't know for sure if he wanted to dismiss Mr. Longeteig. Because sentencing is fast approaching, this court offered to appoint co-counsel to work with Mr. Longeteig. Both Mr. Longeteig and Mr. Lankford agreed to this procedure. The court appointed Ms. Fisher to work as co-counsel and, at that time, the court admonished Mr. Lankford that sentencing was fast approaching and that if a postponement was requested because of the presence of the new attorney, that such postponement would not automatically be granted. Shortly thereafter, Ms. Fisher moved to dismiss Mr. Longeteig as co-counsel. Although the court did grant said motion, which it must do in such cases, it ordered Mr. Longeteig to be present at all subsequent hearings and to assist, if requested to do so, by Ms. Fisher or by Mr. Lankford.

That is a summary of Mr. Lankford's relationship with Mr. Longeteig, and the court's attention to Mr. Lankford's right to counsel. Certainly, the right to counsel does attach critical stages of the criminal proceedings. The record here is clear that the petitioner was informed of his right to counsel at arraignment and that counsel

was appointed at his request and without delay. At all stages, the defendant was afforded a reasonable assistance of counsel. The court, in this case, arguably pampered the defendant with reference to counsel. The court did all it could to prompt the defendant to hire counsel quickly, or to have counsel appointed quickly. Eventually, the court appointed him another lawyer – or two lawyers. So, with reference to the petitioners allegations that counsel was not appointed in a timely fashion, the motion will be denied.

The next matter is the fact that, or the allegation that there was error in that no psychological evaluation was requested or ordered by the court, pursuant to Idaho Code 18-207 sub(c), which permits the use of expert testimony on the issues of Mens Rea. No facts were demonstrated concerning the defendants mental condition which could have given the court reason to believe that an expert was necessary, in this case, to testify as to the petitioners state of mind. Relief based on that claim, will be, therefore, denied.

Now, the petitioner claims, furthermore, that the court should have suppressed, on its own motion, the testimony of Dennis Phloeger concerning statements made by the petitioner after he was aprehended [sic] in Texas. Such functions [sic] is normally the function of the defense counsel, however, here, the court, out of the presence of the jury, Sua Sponte, inquired into and made a finding that the petitioners statement to Mr. Phloeger was voluntary, and furthermore, the petitioner had no objection to its introduction at trial. Such can be found in the transcript on page 521. The statement in question was voluntarily given, there were no threats or other

improper tactics on the part of the questioners, the statement followed proper Miranda warnings and the petitioner knowingly and voluntarily waived his Miranda rights. Petitioner, in this case, has not shown sufficient evidence to show the circumstances of his interrogation resulted in his making an involuntary statement. Likewise, there is no error on the trial court's failure to suppress a statement made by the petitioner when he was incarcerated in Idaho County jail. The substance of this statement was first introduced by the defense at trial and the use of the transcript of the statement was then proper for impeachment purposes. The record shows that the statement was, indeed, voluntarily given, the petitioner initiated the contact with the deputy, Deputy Randy Baldwin, to whom he gave the statement. At trial, Deputy Baldwin testified that he was at home and that he was informed the petitioner wanted to make a statement. The petitioner testified that he wanted to talk to someone, that the statement was true and was being made voluntarily. The petitioner has not demonstrated that any weakened condition, depression or psychological state negated the voluntariness of the statement. Petitioner understood the meaning and consequences of his statement, the petitioner has not shown that he was so disturbed that he did not know what he was doing when he made the statement. As a consequence, the motion for relief based upon those allegations, specifically: That the court failed to suppress, on its own, those statements, will be denied.

The petitioner's second claim, is that his sentence imposed by this court is in violation of the United States and Idaho Constitution, and of the laws of Idaho, for the

reason that he did not have notice that the death penalty might be imposed, for the reason that, the jury was not questioned concerning their opinions of death sentence. For improper use of a pre-sentence report, for a use of certain testimony of the petitioner at Mark Lankford's trial, for court's failure to grant a new trial on the grounds of ineffective assistance of counsel. The petitioner claims that trial court failed to give notice that the death penalty would be imposed. The petitioner has failed to show that he did not have notice that the death penalty could be imposed for the offenses he was found guilty for. Idaho Code 18-4004, says that punishment for first-degree murder is life imprisonment or death. Certainly, the statute serves as notice of what punishment might be imposed. The court made sentencing possibilities clear from the time the defendant first appeared in front of the magistrate. Furthermore, the petitioner's attorneys were well aware that the death penalty might be imposed. The fact that the prosecutor gave notice that he did not intend to seek the death penalty has no bearing on the adequacy of notice to petitioner that the death penalty might be imposed. The prosecutor's determination not to seek the death penalty does not eliminate it as a possible punishment. State's recommendation to the trial court is only advisably, not binding. The court alone, has the responsibility to determine punishment and the procedure to be followed when death is a possible punishment is mandatory. Pre-sentence investigation must be conducted and a hearing held to consider evidence in aggravation and mitigation. Here, the court filed the statutory deliniated [sic] procedures and petitioner can not

claim lack of notice in the imposition of one of the possible punishments. The request for relief on this basis is, therefore, denied.

The next matter concerns the allegations that there was error and that there was no juror questioning concerning their attitudes concerning the death penalty. In Idaho, the court sentences without a jury. There's no federal constitutional right that the jury be involved in sentencing, as set forth in Spasiano (Sp) versus Florida, and the Idaho case of State versus Creech; the Idaho court found no state constitutional right of jury sentencing. Since the jury determines only the guilt, there's no need to question jurors about their attitudes towards capital punishment. And finally, and most importantly with respect to this particualr [sic] issue, the State and the Defendant stipulated that neither the State nor the defense would question the jury concerning capital punishment. Thus, the request for relief on this basis, will be denied.

The petitioner claims, furthermore, that there was error because he had insufficient time to review the pre-sentence investigation report addendum of October 3, 1984, which was received by the petitioner's attorney on October 10, 1984. At the sentencing hearing on October 15, 1984, the court asked the petitioner whether he had a chance to review the pre-sentence report, including the addendum. Petitioner's attorney responded that he had, no objection was made to the admission of the addendum due to the lack of notice of time to renew it, although, objections were, in fact, made to the admission of specific items. If no objections are made at sentencing, no error can be claimed at this proceeding. Certainly, there has

been no evidence adduced at this hearing from which this court could conclude that had the addendum been provided a few days earlier, that the petitioner would have adduced different evidence at trial, or at the sentencing hearing.

* * *

[EXCERPT OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER IN BRYAN STUART LANKFORD VS. STATE OF IDAHO, CASE NO.21327, FILED JULY 14, 1985]

[RECORD, VOLUME II, PAGES 527-528]

* * *

With reference to item "VII-b-1", the Petitioner was advised from the beginning of the proceedings that the death sentence could be imposed if he was convicted of the crimes with which he was charged. The Petitioner knew that the Court might impose the death penalty and that the State's recommendation in this regard was not binding on the Court.

With reference to item "VII-b-2" the parties stipulated that prospective jurors would not be questioned concerning their attitudes toward the death penalty.

With reference to item "VII-b-3" Petitioner, at sentencing, did not object to the addendum due to the lack of notice. The evidence does not demonstrate that any lack of notice in this regard would have affected the manner in which Petitioner proceeded at sentencing or that the same resulted in the Petitioner not receiving a fair trial.

* * *

Supreme Court of Idaho.
113 Idaho 688

STATE of Idaho, Plaintiff-respondent,

v.

Bryan Stuart LANKFORD,
Defendant-appellant.

Bryan Stuart LANKFORD,
Petitioner-appellant,

v.

STATE of Idaho, Respondent.

Nos. 15760, 16170.

July 29, 1987.

Rehearing Denied Oct. 20, 1987.

BAKES, Justice.

Bryan Lankford was convicted by a jury of two counts of first degree murder for the killings of Robert and Cheryl Bravence. Following the trial, the district court held a sentencing hearing and sentenced the defendant to death. Lankford appeals this conviction and sentence and the district court's denial of his petition for post conviction relief before the same court, which was denied after a hearing. The appeals have been consolidated pursuant to I.C. § 19-2719. This matter is additionally before the Court under the statutory provisions of I.C. § 19-2827 which provides for automatic review of death sentences.

Evidence at trial disclosed that in June, 1983, Lankford was living in Texas on probation for a robbery conviction. Lankford was arrested for a DUI violation.

Fearing that this violation of his probation would lead to his imprisonment, he fled the state with his older brother, Mark Lankford, in the latter's car. The pair eventually made their way to Idaho County, where they camped in the forest near Grangeville. They concluded that, because the monthly payments on Mark Lankford's car were delinquent, the police would be searching for it and that they needed to abandon the car to avoid capture. They left the car in the woods covered with brush and set off to steal another car.

The brothers came upon the Bravences' campsite and decided to take the Bravences' van. Bryan Lankford walked into the camp armed with a shotgun and engaged the Bravences in conversation. Subsequently, Mrs. Bravence left the group and went to a nearby creek. At this point, Mark Lankford ran into the campsite and ordered Robert Bravence to kneel down on the ground. While kneeling, Mark then hit Robert Bravence over the head with a nightstick. Cheryl Bravence then came up from the creek, and Mark told her to kneel down on the ground and then hit her over the head with the same nightstick. The Bravences were beaten with such force that their skulls had to be reconstructed by an anthropologist before the cause of death could be scientifically determined.

The brothers loaded the bodies into the van and headed back into the forest. The bodies were removed from the van and concealed under branches and other debris a short distance from where the Lankfords had abandoned their car. Lankford and his brother then took the van and traveled through Oregon and California before abandoning it in Los Angeles. During their flight

from the murder scene they purchased accommodations and food with the Bravences' credit card.

After abandoning the van, the brothers returned to Texas where they stayed several weeks with Ray Ralmuto, a friend of Lankford's. Fearing that the authorities were closing in on them, they fled into a remote and inaccessible area of the state where they were ultimately discovered and captured. Among the items found with the Lankfords was a knife which had belonged to Mr. Bravence.

Although the Bravences' bodies were not found until late September, they had been reported missing and, upon discovering the van, the Los Angeles Police Department conducted a forensic examination of the vehicle. The examination turned up numerous incriminating items, including the Lankfords' fingerprints. The Los Angeles police then turned the investigation over to the Federal Bureau of Investigation.

After his arrest Lankford made numerous confessions regarding the killings, none of which were challenged on direct appeal.[1] These statements included two statements made to Texas law enforcement officers, several statements and a written confession to an FBI agent and, after an aborted suicide attempt, Lankford made another statement to an Idaho County deputy sheriff. After Lankford was extradited to Idaho, he was charged

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[1] At the post conviction relief hearing, Lankford claimed he had been denied effective assistance of counsel based on his trial attorney's failure to challenge the admission of these confessions.

with two counts of first degree murder. An attorney was *appointed* to represent Lankford.

The trial was held in March, 1984. In the process of jury selection, in accord with a stipulation by the parties, the trial court separated from the venire all persons who had heard a significant amount of information about the case in order that the jury could be selected from people who had heard little of the case. Voir dire then took place as to the remaining jurors. No significant difficulty was experienced in selecting the jury.

Lankford's defense theory was that he was only an accessory after the fact. Lankford testified in his own behalf and stated that he was dominated by his older brother who was a violent and dangerous person. He testified that he thought his brother would merely knock out the Bravences, and he had not pointed the shotgun at them upon entering the camp. He also testified that after the murders he was hysterical and remained in the van while his brother hid the bodies in the woods. The jury nevertheless found Lankford guilty of two counts of first degree murder.

Subsequent to conviction and sentencing, Lankford filed a petition seeking post conviction relief and moved to disqualify the district judge from presiding at the post conviction relief hearing on the basis of prejudice. The motion was denied. At the post conviction hearing, Lankford argued that his trial counsel had been ineffective for a number of reasons, including his failure to demand that Lankford be subject to a psychological and physical evaluation. The defendant further argued that the trial court had erred in failing to require trial counsel to be forced to

submit to an alcohol evaluation. After a hearing, the court denied post conviction relief.

On appeal to this Court, Lankford raises twenty-two issues. Eight of these issues arose from the trial proceedings; nine of the issues questioned the sentencing procedure; two issues dealt with the post conviction relief proceeding; and three issues relate to this Court's statutorily required automatic review of a death sentence. While this Court has reviewed all twenty-two issues, we have found that some were not raised below and thus were not preserved for appeal. Several issues are closely related, and we have consolidated them. For the reasons set out below, we affirm the judgments and sentences.

I

Direct Appeal Issues

At the outset we note that the defendant appealing from a criminal conviction bears the burden of demonstrating error in the lower court. *State v. Wallace*, 98 Idaho 318, 563 P.2d 42 (1977). Furthermore, error will not be presumed on appeal but must be affirmatively shown by the appellant, and with limited exceptions error at trial must be properly objected to and preserved to merit review. *State v. Thomas*, 94 Idaho 430, 489 P.2d 1310 (1971).[2] Keeping in mind the standards of review set by our prior case law, we now turn to the issues.

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[2] The exception to the general rule is that this Court will review "fundamental error" on appeal even when no adequate

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A.

Lankford argues that the trial court failed to question jurors regarding the adverse effect of pretrial publicity, and therefore he was denied his constitutional right to a trial by a fair and impartial jury. Lankford acknowledges that no objection was raised below as to the *voir dire* process, and therefore the issue is not properly preserved for appeal, absent fundamental error. *State v. White, supra.* However, Lankford argues nevertheless that the failure to question jurors regarding pretrial publicity amounted to fundamental error.

The trial court initially questioned jurors regarding pretrial publicity and, based upon a procedure agreed on in advance by counsel, then eliminated all those who felt that they could not fairly try the case.[3] Thereafter, the

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objection has been interposed at trial. *State v. White*, 97 Idaho 708, 551 P.2d 1344 (1976), *cert. den.* 429 U.S. 842, 97 S.Ct. 118, 50 L.Ed.2d 111 (1976).

> " 'Error that is fundamental must be such error as goes to the foundation or basis of the defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to prevent him to waive. Each case will of necessity, under such a rule, stand on its own merits. Out of facts in each case will arise the law.' *See also State v. Haggard*, 94 Idaho 249, 486 P.2d 260, 262 (1971)." *Smith v. State*, 94 Idaho 469, 475, n. 13, 491 P.2d 733, 739, n. 13 (1971).

[3] At the beginning of the *voir dire* process, upon the request of both the state and Lankford's attorneys, the district

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trial court conducted a limited *voir dire* examination and the balance of the *voir dire* process was conducted by counsel. Lankford has not established any error, much less fundamental error, in the jury selection process. This Court has ruled that great latitude is to be allowed in examination of veniremen upon *voir dire*. *See State v. Pointier*, 95 Idaho 707, 518 P.2d 969 (1974); *State v. Bitz*, 93 Idaho 239, 460 P.2d 374 (1969). The *voir dire* procedure was established by stipulation of counsel, and there is no indication of any abuse of discretion by the trial court in the manner in which he exercised the *voir dire* examination. Accordingly, the claimed error is without merit.

B.

Next, Lankford asserts that it was a "fundamental error" and a violation of due process for the trial court to allow uniformed sheriff's deputies to sit in the courtroom

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court judge requested all prospective jurors who "will not be in a position to serve as a result of bias, prejudice or undue influence or any other reason that they may be aware of" to raise their hands. Those veniremen who raised their hands were then sent to the back of the room, and the *voir dire* examination continued without calling those persons.

Although the procedures used by the district judge may not have been common practice, both counsel agreed in advance that the procedure was designed and reasonably calculated to assure a selection of an unbiased jury. Lankford's attorney, the prosecutor and the district court judge were all residents of Idaho County and familiar with the pretrial publicity and the mood in the community. There is simply no error in using a *voir dire* procedure which both counsel agreed was designed to assure the selection of a fair and impartial jury.

with him. We disagree. The fact that Lankford was guarded while present at the trial fails to raise the question of fundamental constitutional error. The record demonstrates that Lankford did not appear in prison garb, *State v. Crawford*, 99 Idaho 87, 577 P.2d 1135 (1978); rather, at trial he appeared in a three-piece suit. A sheriff's officer sat behind him. In *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), the United States Supreme Court addressed the issue of whether the presence of four uniformed and armed officers was so inherently prejudicial that the defendant was denied his constitutional right to a fair trial. Writing for the majority, Justice Marshall found that unlike cases which involved a criminal defendant being brought to trial in prison garb the presence of the uniformed troopers did not prejudice the defendant. Justice Marshall stated:

> "We do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's changes of receiving a fair trial. (Citations omitted.) But we simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of the courtroom's spectator section. (Footnote omitted.) Even had the jurors been aware that the deployment of the troopers was not common practice in Rhode Island, we cannot believe that the use of the four troopers tended to brand the respondent in their eyes 'with an unmistakable mark of guilt.' " *Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 1347, 89 L.Ed.2d 525 (1986) (citations omitted).

No error resulted from the fact that Lankford was guarded by law enforcement officers during his trial.

C.

Lankford next makes a broad based and comprehensive attack on the instructions which were presented to the jury. Lankford claims that the jury instructions as a whole misstated the law and were so misleading and confusing that the defendant was denied his right to a fair trial. In addition to claiming the instructions as a whole are erroneous, Lankford also attacks numerous individual instructions. Many of the errors claimed in the instructions were not addressed by objections during the trial and have not been properly preserved for this appeal. Absent a timely objection to the jury instructions, Lankford's assignments of error with respect thereto are not entitled to consideration on appeal. *State v. Watson*, 99 Idaho 694, 587 P.2d 835 (1978).

Where the jury instructions, taken as a whole, correctly state the law and are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole charge and was not misled by any isolated portion thereof. *State v. Tope*, 86 Idaho 462, 387 P.2d 888 (1963). After reviewing the record we find that the instructions, either individually or as a whole, were not in error. We will deal specifically with two of Lankford's claims of error.

First, Lankford argues that the district court erred when it refused defendant's Proposed Jury Instruction Number 4[4] that asked the jury to render a special verdict

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[4] "DEFENDANT'S REQUESTED INSTRUCTION NO. 4. . .

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on the defendant's intent. The crux of Lankford's claim is that under the United States Constitution a defendant cannot be sentenced to death for felony murder without a finding of an *intent* to kill. However, in Idaho it is the judge and not the jury who makes the determination of whether the death sentence will be imposed. Accordingly, the district court did not err when it refused Lankford's Proposed Instruction No. 4 which attempted to impermissibly shift the trial court's duty to find an intent to kill to the jury.

Lankford also argues that Instruction No. 17[5] was improper because it instructed the jury that "malice is

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"Answer this question only if you find the defendant, Bryan Lankford, guilty of Murder in the first degree.

Do you find, beyond a reasonable doubt that Bryan Lankford himself killed, attempted to kill, or had any intent to kill either of the victims in this case?"

[5] "INSTRUCTION NO. 17

" 'Malice', as aforesaid, may be either express or implied. Malice is express when there is manifested an intention unlawfully to kill a human being. Malice is implied when the killing results from an act involving a high degree of probability that it will result in death, which act is done for a base, antisocial purpose, and with a wanton disregard for human life by which is meant, an awareness of a duty imposed by law not to commit such acts followed by the commission of the forbidden act despite that awareness, or when the killing is a direct and casual result of the perpetration or attempt to perpetrate a felony inherently dangerous to human life, specifically in this case robbery.

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implied when the killing results from an act involving a high degree of probability that it will result in death. . . ." Lankford argues that the instruction relieved the state of proving intent and since the state must prove each essential element of a crime beyond a reasonable doubt the jury instruction was erroneous and in effect diminished the state's burden of proof. We disagree. Contrary to Lankford's assertion, the instruction does not state that killing in perpetration of a robbery is malice *per se*. The instruction *does* advise the jury that malice can be implied in some situations. The United States Supreme Court has stated that:

> "In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury. [Citation omitted.] . . . .
>
> "No one doubts that the trial court could properly have instructed the jury that it could *infer* malice from respondent's conduct [Citation omitted.] Indeed, in the many cases where there is no direct evidence of intent, that is exactly how intent is established. For purposes of deciding this case, it is enough to recognize that in some cases that inference is overpowering. [Citation omitted.]" *Rose v. Clark*, ___ U.S. ___, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). (Emphasis in original.)

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"The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

" 'Aforethought' does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act."

Murder committed during the course of a robbery is by definition murder in the first degree. I.C. § 18-4003. Proof that the murder occurred during the commission of a robbery merely is a substitute for specific proof of premeditation on the theory that one who prepares for a robbery by making arrangements to use deadly force is guilty of acts as culpable as, and probably comprising, premeditation. *See* 40 Am.Jur.2d § 72, Felony-murder Generally.

D.

Next, Lankford attacks the constitutionality of I.C. § 18-4003(d) – felony murder,[6] arguing that under *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and its progeny the statute violates the 8th amendment prohibition against cruel and unusual punishment and the 14th amendment guarantee of due process by punishing conduct without requiring proof of a mental state. Lankford's argument has been considered by this Court at length in *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), and *State v. Paradis*, 106 Idaho 117, 676 P.2d 31 (1984), and we have found the statute to be constitutional and in compliance with *Enmund*.

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[6] **18-4003. Degrees of murder.** – . . .

. . . .

"(d) Any murder committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem is murder of the first degree. . . ."

II

Sentencing Issues

Imposition of a sentence is within the sound discretion of the trial court and will not be disturbed by a reviewing court in the absence of an abuse of that discretion, and a sentence that is within prescribed limits of the sentencing statute will not ordinarily be considered an abuse of discretion. *State v. Butler*, 95 Idaho 899, 523 P.2d 31 (1974). After reviewing the record, we find that the district court did not abuse its discretion in sentencing Lankford and that there were no significant errors in the sentencing procedure.

A.

After Lankford was convicted of two counts of felony murder, but before sentencing, the state entered into an immunity agreement with him under I.C. § 19-1114 in order to obtain his testimony against his brother. Lankford contends that this grant of immunity (which was after the verdict but prior to his sentencing) deprived the district court of the authority to sentence the defendant. We conclude that the district court did not err when it found that the immunity agreement (Defendant's Exhibit #1) between the state and Lankford did not immunize Lankford from sentencing for the crimes for which he had already been convicted when the agreement was entered into.

I.C. § 19-1114 states in part that, "If . . . the person would have been privileged to withhold the answer given . . . that person shall not be prosecuted or subject to

penalty . . . *on account of any fact or act concerning which . . . he answered.*" (Emphasis added.) By its clear wording, the statute does not apply in this case. None of the testimony given by Lankford pursuant to the immunity agreement was used to prosecute or to punish Lankford.[7] Instead of providing retroactive protection, the

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[7] Lankford asserts that the district court judge used the immunized testimony in its findings of fact to support the imposition of the death penalty. However, the record does not support that assertion. While the district court described Lankford's testimony at his brother's motion for new trial in its sentencing memorandum, it was not considered as an aspect of any of the statutory aggravating circumstances found by the court. During the district court's oral discussion of the sentence, the judge stated:

> "The defendant has shown no remorse for his offenses. He has not cooperated with authorities after his arrest. He has told authorities that he and his brother had nothing whatsoever to do with the death of the Bravences. He has testified that his brother was alone involved in the murders. He has testified on October 10, 1984 in the companion case, *State v. Mark Lankford*, Idaho County Case No. 20158, that he called the *Lewiston Tribune* and claimed that it was he alone who murdered the Bravences. This he later denied and offered the explanation which is set forth in the addendum to the presentence investigation report under date of October 3, 1984, to the effect that it was simply part of a plan that would secure freedom for his brother, who could in turn free him."

Although it is true that the district court judge pointed out the conflicting testimony given by Lankford at various times, including the testimony given pursuant to the immunity agreement, there has been no showing that the sentence was based upon the comments quoted above.

immunity agreement was prospective in effect and protected Lankford from any other charges that might have been brought pursuant to his use of the Bravences' property.

B.

Next Lankford argues that the district court erred when it denied his motion for a continuance of the sentencing hearing. The relevant facts show that Lankford made a motion to have co-counsel appointed. The motion was granted and additional counsel was appointed; however, the district court warned Lankford and the newly appointed counsel that granting the motion would not automatically lead the court to grant a motion for continuance. On October 10, 1984, the new co-counsel moved to discharge the trial counsel; this motion was also granted and the district court once again warned Lankford that granting the motion would not automatically lead to a continuance.

"A decision to grant or deny a motion for continuance is vested in the sound discretion of the trial court." *State v. Ward*, 98 Idaho 571, 574, 569 P.2d 916, 919 (1977). Absent a showing that the appellant has shown that his substantial rights have been prejudiced, or that the district court abused its discretion, we will not reverse a denial of a motion for continuance. *See State v. Laws*, 94 Idaho 200, 485 P.2d 144 (1971).

The motion for a continuance was not arbitrarily denied. The record demonstrates that the district court made extensive findings into the information available to Lankford's attorney for sentencing purposes. Lankford's

new attorney had adequate information and called numerous witnesses at the sentencing hearing. There was no showing that important witnesses were unavailable due to the denial of the motion. The state was prepared for the scheduled hearing, brought in witnesses, and incurred significant expenses, while no prejudice to Lankford was shown. In *State v. Brown*, 98 Idaho 209, 212 560 P.2d 880, 883 (1977), we stated that "a defendant may not indefinitely postpone trial or sentencing by continually changing counsel. . . . "

C.

Lankford contends that the district court erred in imposing the death penalty where the prosecution offered no evidence in support of the statutory aggravating circumstances set forth in I.C. § 19-2515. At sentencing, the prosecutor did not seek the death penalty, and therefore he did not offer any additional evidence at the sentencing hearing. It is Lankford's contention that the evidence produced at trial was not available to the judge for purpose of sentencing, and therefore the district court had no evidence with which to find the statutorily required aggravating circumstances. However, I.C. § 19-2515(c) expressly provides, "Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing." The evidence that was used at the sentencing hearing by the trial court judge amply supported the trial court's conclusion. The trial court is entrusted with the responsibility for sentencing in Idaho, I.C. § 19-2515(c), (d), (e); *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), *cert. den.*, 465 U.S. 1051, 104 S.Ct. 1327, 79 L.Ed.2d 722 (1984), and therefore the district

court was not bound by the recommendations of the prosecuting attorney. In *State v. Kohoutek*, 101 Idaho 698, 619 P.2d 1151 (1980), we held that there was no abuse of a district court's discretion when it proposed a sentence different from that recommended by the prosecuting attorney. The district court had sufficient evidence before it and did not abuse its discretionary authority to sentence the defendant.

D.

Next, Lankford contends that the district court erred when it failed to notify the defendant of the possibility of the imposition of the death penalty. After the verdict was rendered, and in preparation for sentencing, the district court ordered the prosecution to give written notice on whether it would seek the death penalty. The prosecution responded that it would not. Lankford argues that the prosecution's written notice negated the statutory notice that he might be sentenced to death. We disagree.

The record reflects that at his arraignment the district court expressly advised Lankford that the death penalty was a possible sentence for the crimes he was charged with. Additionally, the United States Supreme Court has pointed out that the "existence [of a death penalty statute] on the statute books provides fair warning as to the degree of culpability which the state ascribed to the act of murder." *Dobbert v. Florida*, 432 U.S. 282, 298, 97 S.Ct. 2290, 2300, 53 L.Ed.2d 344 (1977). Lankford has not cited us to any authority which supports his position that he was entitled to greater notice than that given by the statutes and by the district court.

E.

Next, Lankford attacks the constitutionality of Idaho's capital punishment procedure, arguing generally that I.C. § 19-2515 violates the eighth amendment's prohibition on cruel and unusual punishment and the sixth amendment's right to a trial by jury because the statute does not require jury participation in the sentencing procedure. Furthermore, Lankford contends that I.C. § 19-2515(d) is specifically unconstitutional under both Idaho and United States Constitutions because it does not require the district court to limit the testimony at the sentencing hearing to live testimony. Lankford argues that it is essential that a defendant be allowed to cross examine and rebut adverse sentencing evidence because of the possibility that the trial court is prejudiced and that the Idaho statute allows rampant use of hearsay and other inadmissible information.

The issue of jury participation has been resolved in Idaho in *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), and *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981), and approved under the United States Constitution in *McMillan et al. v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986). The issues of hearsay testimony and defendant's right to cross examine or confront adverse testimony has likewise been resolved against appellant's position. *See State v. Osborn, supra.*

F.

Next, Lankford argues that the district court's failure to consider in writing two mitigating factors which were produced at the sentencing hearing was error that

requires remanding for sentencing. The two mitigating factors which Lankford complains were not considered in writing by the district court are (1) that the prosecution recommended a sentence less than the death penalty, and (2) that the defendant had taken and substantially passed two polygraph tests that had been requested by the state. Lankford asserts that the sentencing statute, I.C. § 19-2515, has been given a broad interpretation by the court with the intent of ensuring that a thorough and reasoned analysis of all relevant factors take place.

The record demonstrates that the district court described the mitigating factors that it considered in sentencing Lankford. Those mitigating factors included all of the factual evidence presented in mitigation by the defendant and the arguments made in connection with them. It is clear from the record that the district court judge complied with the requirements of I.S. § 19-2515.

III

Post Conviction Relief Issues

After sentencing and conviction, Lankford brought an action for post conviction relief in the district court. After an extended hearing, the district court made findings denying this petition. A denial of post conviction relief will not be disturbed on appeal where there is substantial competent evidence supporting the denial. *State v. Hinkley*, 93 Idaho 872, 477 P.2d 495 (1970). After reviewing the record of the post conviction relief proceeding we find that there was substantial and competent evidence to support the district court's findings.

A.

Lankford first argues that he was deprived of his constitutional right to effective assistance of counsel. Lankford raises twelve areas where it is claimed his trial attorney failed to provide effective assistance. Lankford argues that his trial attorney failed to: (1) file a motion for change of venue; (2) adequately prepare for and conduct the *voir dire* which would allow the selection of a fair and impartial jury; (3) fully investigate and prepare the factual and legal basis for the defendant's case; (4) file motions to suppress constitutionally infirm statements taken of the defendant; (5) file a motion for psychiatric or psychological evaluation; (6) file a request for discovery; (7) research and raise viable defenses; (8) object to the defendant being compelled to go to trial under heavy guard; (9) request a limiting instruction on the use of prior inconsistent statements; (10) object to irrelevant, immaterial and prejudicial evidence; (11) request a limiting instruction on impeachment by prior felony conviction; (12) object to erroneous instructions. Lankford concludes that these errors and omissions of the trial counsel require a reversal of the defendant's convictions. However, we conclude that the record does not support the allegations.

A claim of ineffective assistance of counsel cannot be presumed by an appellate court. *State v. Elisondo*, 97 Idaho 425, 546 P.2d 380 (1976). We have examined an extensive record in which the parties explored in detail the basis for Lankford's allegations through witnesses and affidavits and through direct and cross examination. A review of this record clearly establishes that Lankford was not deprived of the right to effective assistance of

counsel. The United States Supreme Court has stated that the test to be applied to a claim of ineffective assistance of counsel in whether counsel's conduct so undermined the proper function of the adversarial process that the trial court cannot be relied on as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Also See Burger v. Kemp*, ___ U.S. ___, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987). This issue has been extensively litigated in Idaho. In *Estes v. State*, 111 Idaho 430, 725 P.2d 135 (1986), we summarized the existing law as follows:

> "This Court has also addressed the question of what constitutes effective assistance of counsel. In short, a defendant is entitled to the reasonably competent assistance of an attorney. *State v. Tucker*, 97 Idaho 4, 8, 539 P.2d 556, 560 (1975) *Accord Strickland v. Washington*, 466 U.S. at 686, 104 S.Ct. at 2064. 'A showing that defendant was denied the reasonably competent assistance of counsel is not sufficient by itself to sustain a reversal of the conviction. The defendant, in most cases, must make a showing that the conduct of counsel contributed to the conviction or the sentence imposed.' *State v. Tucker*, 97 Idaho at 4, 539 P.2d at 564 (1975); *see also State v. Tisdel*, 101 Idaho 52, 54, 607 P.2d 1326, 1328 (1980). We have also repeatedly stated that we will not attempt to second-guess strategic and tactical choices made by trial counsel. *State v. Larkin*, 102 Idaho 231, 233, 628 P.2d 1065, 1067-68 (1981); *State v. Tucker*, 97 Idaho at 10, 539 P.2d at 562.
>
> "These standards, articulated by both the United States Supreme Court and this Court, must be used to determine whether Estes received effective assistance of counsel. As the Supreme Court has stated, 'A fair assessment of attorney performance requires that every effort

> be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time.' *Strickland v. Washington*, 466 U.S. at 689, 104 S.Ct. at 2065. The presumption in evaluating attorney effectiveness is that the attorney is competent and that his actions represent sound trial strategy. A defendant shoulders a difficult burden when he seeks to assert ineffective assistance of counsel." *Estes v. State*, 111 Idaho at 434, 725 P.2d at 139 (footnote omitted).

At the post conviction relief hearing, Lankford's trial counsel testified that the extensive physical evidence, Lankford's numerous admissible confessions, and that verbal testimony which would be produced by the prosecution at trial was sufficient to convict Bryan Lankford of first degree murder. He stated that after evaluating this evidence he determined that Lankford's best opportunity to avoid a first degree murder conviction was to defend on the theory that Lankford was an "accessory after the fact." All of the charges against Lankford's counsel are a direct result of the trial counsel's strategic and tactical choices to defend Lankford on the "accessory after the fact" defense. Because it is not the function of a reviewing court to substitute its judgment or that of a substitute counsel for the strategic and tactical choices of the trial counsel, *State v. Larkin*, 102 Idaho 231, 233, 628 P.2d 1065, 1067-68, Lankford's new counsel must do more than demonstrate that alternative strategies were available which might have been better. In sum, none of the numerous charges made by the defendant against his trial counsel demonstrate that (1) Lankford was denied the reasonably

competent assistance of counsel, and (2) that the conduct of his trial counsel contributed to his conviction.

B.

Next, Lankford claims that the district court erred in denying defendant's motion to disqualify the court for prejudice.[8] Following conviction and sentencing, the defendant moved to disqualify for cause the trial judge from the post conviction relief proceeding pursuant to I.R.C.P. 40(d)(3)[9] and I.C.R. 25(b).[10] Lankford's attorney

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[8] The record demonstrates that Lankford's counsel made it clear that the motion to disqualify *was for cause* and was not brought under I.C.R. 25(a) permitting peremptory disqualification. (Tr., post conviction relief proceedings, p. 20.) We note that I.C.R. 25(a) is not available to a criminal defendant in a post conviction relief proceeding.

[9] **"Rule 40(d)(3). Motion for disqualification.** – Any such disqualification for cause shall be made by a motion to disqualify accompanied by an affidavit of the party or his attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Such motion for disqualification for cause must be made no later than 5 days after service of a notice setting the action for trial or pre-trial, and must be made before any contested proceeding in the action has been submitted for decision to the judge sought to be disqualified; provided where a new trial is granted either by the trial court or an appellate court such motion may be made by a party not later than 5 days after service of the notice setting the action for re-trial. The presiding judge or magistrate sought to be disqualified shall grant or deny the motion for disqualification upon notice and hearing in the manner prescribed by these rules for motions."

[10] **"Rule 25. Disqualification of judge.** – . . . "(b) Disqualification for cause. Any party to an action may disqualify a

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filed the affidavit of prejudice and no counter affidavit was filed.[11] The motion was denied. The parties later stipulated to facts which they believed the trial judge could testify to if called as a witness.[12] The stipulation

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judge or magistrate from presiding in any action upon any of the following grounds:

"(1) That he is a party, or is interested, in the action or proceeding.

"(2) That he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law.

"(3) That he has been attorney or counsel for any party in the action or proceeding.

"(4) That he is biased or prejudiced for or against any party or his case in the action. . . . "

[11] The affidavit set forth specific facts demonstrating that the judge was prejudiced because of his prior rulings made in connection with the trial and stated that the judge *might* be a material witness to the allegations of ineffective assistance of counsel.

[12] The stipulation reads: "Comes now, attorney for Petitioner, Joan Fisher and attorney for Respondent, Henry R. Boomer, do hereby stipulate and agree that if the Honorable George R. Reinhardt was to testify in this matter, he would say the following: One, that prior to attorney W.W. Longeteig's appointment as counsel for Bryan Stuart Lankford in Case No. 20157, Judge George R. Reinhardt believed that W.W. Longeteig had either pled guilty, been arrested, or was convicted of driving under the influence of alcohol on more than one occasion, and based upon that, Reinhardt felt that W.W. Longeteig had a problem with alcohol.

"Two, that on July 28, 1984, George Reinhardt received certain correspondence from Bryan Lankford which is attached

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(which was not based on actual testimony) stated that the judge had knowledge that Lankford's trial counsel had been arrested for DUI and that the judge had received a letter from the defendant requesting a new counsel based on allegations of alcohol abuse, and this letter led to the appointment of co-counsel. The stipulation was received into evidence and then defense counsel reargued its motion asserting that because of the stipulation the trial judge was now a material witness in the case and must be disqualified. This motion was also denied.

Lankford argues that the affidavit and the stipulation were legally sufficient to show prejudice and that the case should be remanded with directions that the trial judge disqualify himself and the matter reassigned. In Idaho a judge cannot be disqualified for actual prejudice unless it is shown that the prejudice is directed against the litigant and is of such a nature and character that it would make it impossible for the litigant to get a fair trial. *State v. Waterman*, 36 Idaho 259, 210 P. 208 (1922).

Lankford's affidavit claimed bias on the following grounds: (a) that the district court judge presided in the trial that found Lankford guilty of two counts of first degree murder; (b) that the judge had previously ruled on

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hereto – which is not, because we were not putting it in writing, but it was a motion that was before the court, which the court ruled upon and appointed co-counsel. And with reference to the allegations concerning alcohol, and based upon paragraph one that said such allegations could be true and as a consequence thereof, appoint Joan Fisher to be Bryan Lankford's co-counsel in Idaho, County in Case No. 20157."

motions for continuance, new trial, alleged ineffective assistance of counsel, and sentencing; (c) that by presiding in the above matters it would be unreasonably difficult for the judge to impartially determine questions of fact raised in the affiant's petition for post conviction relief; (d) that in assessing the death penalty the judge made findings that Lankford is not a credible person; (e) that Lankford is a material witness in the post confiction relief action and because the judge has determined that he is not a credible witness he will not receive an unbiased determination of his credibility; (f) that Lankford had reason to believe that the district court judge may be a material witness to the factual allegation supporting the claim of ineffective assistance of counsel; (g) that at the affiant's sentencing hearing the district court judge elicited testimony to support the court's findings of fact in a leading manner, and thereby showed his bias and prejudice against Lankford; (h) that the district court judge on his own motion caused testimony favorable to the affiant (results of polygraph examination which showed Lankford to be truthful on material facts) to be stricken and removed from the jury's consideration; (i) that there is extreme community hostility and prejudice toward Lankford in Idaho County and that this community feeling makes it unreasonably difficult for the judge, who is a resident of the community and an elected official, to impartially hear the affiant's petition; (j) that because the judge found the offenses of which Lankford was convicted to be heinous, atrocious, and exhibiting an utter disregard for human life he could not now determine the merits of Lankford's petition in a neutral, detached, dispassionate and impartial manner, (k) because the issues

raised in the petition for post conviction relief directly affect the judgment of the district court judge, it is impossible for the trial court to be impartial; (l) that the district court judge has attached an emotional commitment to the "correctmess" of his initial determination and cannot render an impartial determination on the merits of Lankford's position; and (m) that a trial court having presided at the trial and sentencing cannot reasonably be expected to determine matters raised relating to said conviction and sentence in an impartial manner.

Lankford's allegations of bias do not show any actual prejudice on the part of the judge directed toward Lankford of such a nature and character that it would have made it impossible for Lankford to get a fair post conviction hearing. Many of the grounds listed above, stated separately or concurrently, do nothing more than state facts that simply explain the course of events involved in a criminal trial. The remaining grounds are mere allegations that, because the judge had made prior rulings adverse to Lankford, he was biased. Thus, we rejected Lankford's claim that the district court erred in denying his motion to disqualify the judge.

Finally, Lankford's allegation that the district court judge had become a *de facto* material witness in the case and was therefore barred from participation in the case is without merit. The record demonstrates that the district court judge was not subpoenaed as a witness and did not testify in the proceedings. A criminal defendant cannot turn the district court judge into a material witness by introducing a stipulation of facts which the parties believe that the judge might testify to if he was in fact called as a witness. Thus, we reject Lankford's claim that

the district court judge had become a material witness in the post conviction relief proceeding.

C.

Next, Lankford claims that the district court abused its discretion in the post conviction relief proceeding by denying two of Lankford's motions. First, Lankford moved to have the court order complete psychological and physical examinations conducted on himself. The court denied the motion. Then Lankford made a motion to compel an alcohol evaluation of the trial counsel. The court denied this request also. We find that the district court did not abuse its discretion in denying the motions. The testimony clearly indicates that Lankford's trial counsel made the decision not to move for psychological and physical evaluation of the defendant based on the strategy of claiming that Lankford was not involved in the crime but was only an "accessory after the fact." Such a tactical decision should not be reviewed in hindsight during post conviction relief. We find there was no abuse of discretion when the district court denied this motion.

Regarding the motion to compel and alcohol evaluation of Lankford's trial counsel, there is no factual basis in the record for the court to order the alcohol evaluation. Lankford's trial counsel testified that he had not consumed alcohol while working on the case, and nothing in the record refutes this testimony. There is no factual basis in the record for such an unusual demand, and the district court did not abuse its discretion by denying the motion.

IV

Automatic Review

Pursuant to I.C. § 19-2827, all death sentences come to this Court on automatic review. The automatic review statute requires the Supreme Court to "consider the punishment as well as any errors enumerated by way of appeal." The statute requires this Court to undertake a three-part analysis to determine:

> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
>
> "(2) Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in section 19-2515, Idaho Code, and
>
> "(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." I.C. § 19-2827.

(1) *Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.*

Lankford argues that the death penalty was imposed under the influence of passion, prejudice and other arbitrary factors. The basis for Lankford's claim is his assertion that the community where the defendant was tried was outraged by the crime and that it is reasonable to believe that the district court was affected by the community's mood and that this environment led to the arbitrary imposition of the death penalty.

Contrary to Lankford's assertions, there is nothing in the record that indicates that the sentence of death was due to the influence of passion, prejudice or any other

arbitrary factors. To the contrary, we find the trial was conducted in an error-free manner by a district court judge who sought every opportunity to provide Lankford with a fair trial. The jury instructions clearly informed the jury of the applicable law and the evidence presented at trial supports the jury's finding of two counts of first degree murder. The district court, after studying the presentence report and conducting an involved sentencing hearing in which the defendant produced witnesses and information favorable to his cause, made findings both in mitigation and in aggravation. In addition, the Court found numerous statutory aggravating circumstances as delineated under I.C. § 19-2515(g).[13] After laying the

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[13] **"19-2515. Inquiry into mitigating or aggravating circumstances – Sentence in capital cases – Statutory aggravating circumstances – Judicial findings.– . . .**

. . . .

"(g) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed:

> (1) The defendant was previously convicted of another murder.
>
> (2) At the time the murder was committed the defendant also committed another murder.
>
> (3) The defendant knowingly created a great risk of death to many persons.
>
> (4) The murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration.

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findings in mitigation and aggravation, the district court set forth extensive rationale for why the death penalty was imposed. This Court can find no error in the procedure followed by the district court in making its findings.

(2) *Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in Section 19-2515, Idaho Code.*

Lankford argues that the evidence was insufficient to support the district court's finding of the statutory

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(5) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(6) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

(7) the murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e) or (f), and it was accompanied with the specific intent to cause the death of a human being.

(8) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

(9) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise of official duty.

(10) The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding."

aggravating factors. Lankford claims that the evidence also failed to show (1) that the murder and the circumstances surrounding its commission demonstrated an utter disregard for human life; (2) that the defendant acted calmly or in a calculated manner; (3) that the defendant has a propensity to commit murder which will probably constitute a continuing threat to society; (4) that the defendant's acts were accompanied by a specific intent to kill.

After reviewing the complete record in this case, it is evidence that the trial court's finding of the aggravating circumstances listed above were clearly supported by the evidence produced. Lankford's testimony clearly supports aggravating circumstances (1), (2) and (4).

(3) *Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.*

Finally, we have conducted our proportionality review as required by I.C. § 19-2827. To complete this process, we have reviewed the sentence imposed and the sentences imposed in similar cases in an effort to assure that the sentence in this case was not excessively disproportionate.[14] In making such a comparison, we have

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[14] Those case we have considered include: *State v. Johns*, 112 Idaho 873, 736 P.2d 1327 (1987); *State v. Stuart*, 110 Idaho 163, 715 P.2d 833 (1985); *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985); *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985); *State v. Fetterly*, 109 Idaho 766, 710 P.2d 1202 (1985); *State v. Bean*, 109 Idaho 616, 710 P.2d 526 (1985); *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984); *State v. Bainbridge*, 108 Idaho

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generally considered (1) the nature of and the motive for the crime committed; (2) the heinous nature of the crime;

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273, 698 P.2d 335 (1985); *State v. Paradis*, 106 Idaho 117, 676 P.2d 31 (1983); *State v. Gibson*, 106 Idaho 54, 675 P.2d 33 (1983); *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983); *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983); *State v. Major*, 105 Idaho 4, 665 P.2d 703 (1983); *State v. Mitchell*, 104 Idaho 493, 660 P.2d 1336 (1983), *cert. den.*, 461 U.S. 934, 103 S.Ct. 2101, 77 L.Ed.2d 308 (1983); *State v. Carter*, 103 Idaho 917, 655 P.2d 434 (1982); *State v. Olin*, 103 Idaho 391, 648 P.2d 203 (1982); *State v. Stormoen*, 103 Idaho 83, 645 P.2d 317 (1982); *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981); *State v. Griffiths*, 101 Idaho 163, 610 P.2d 522 (1980); *State v. Padilla*, 101 Idaho 713, 620 P.2d 286 (1980); *State v. Fuchs*, 100 Idaho 341, 597 P.2d 227 (1979); *State v. Needs*, 99 Idaho 883, 591 P.2d 130 (1979); *State v. Lindquist*, 99 Idaho 766, 589 P.2d 101 (1979); *State v. Bradley*, 98 Idaho 918, 575 P.2d 1306 (1978); *State v. Birrueta*, 98 Idaho 631, 570 P.2d 868 (1977); *State v. Allen*, 98 Idaho 782, 572 P.2d 885 (1977); *State v. Ward*, 98 Idaho 571, 569 P.2d 916 (1977); *State v. Gerdau*, 96 Idaho 516, 531 P.2d 1161 (1975); *State v. Powers*, 96 Idaho 833, 537 P.2d 1369 (1975) *cert. den.*, 423 U.S. 1089, 96 S.Ct. 881, 47 L.Ed.2d 99; *State v. Hokenson*, 96 Idaho 283, 527 P.2d 487 (1974); *State v. Hatton*, 95 Idaho 856, 522 P.2d 64 (1974); *State v. Standlee*, 96 Idaho 165, 525 P.2d 360 (1974); *State v. Foley*, 95 Idaho 222, 506 P.2d 119 (1973); *State v. Beason*, 95 Idaho 267, 506 P.2d 1340 (1973); *State v. Atwood*, 95 Idaho 124, 504 P.2d 397 (1972); *State v. Sanchez*, 94 Idaho 125, 483 P.2d 173 (1971); *State v. Gomez*, 94 Idaho 323, 487 P.2d 686 (1971); *State v. Dillon*, 93 Idaho 698, 471 P.2d 553 (1970), *cert. den.*, 401 U.S. 942, 91 S.Ct. 947, 28 L.Ed.2d 223 (1971); *State v. Radabaugh*, 93 Idaho 727, 471 P.2d 582 (1970); *State v. Rodriguez*, 93 Idaho 286, 460 P.2d 711 (1969); *State v. Jiminez*, 93 Idaho 140, 456 P.2d 784 (1969); *King v. State*, 93 Idaho 87, 456 P.2d 254 (1969); *State v. Gonzalez*, 92 Idaho 152, 438 P.2d 897 (1968); *State v. Chaffin*, 92 Idaho 629, 448 P.2d 243 (1968); *Carey v. State*, 91 Idaho 706, 429 P.2d 836 (1967); *State v. Koho*, 91 Idaho 450, 423 P.2d 1004 (1967); *State v. Anstine*, 91

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and (3) the nature and character of the defendant to determine whether the sentence was proportionate and just. After thoroughly examining the record and evaluating these factors, we find nothing that would indicate that the sentence of death imposed against Lankford was disproportionate or unjust.

In this case, Lankford was found guilty of a savage murder against two innocent campers who were selected because they owned a van which the defendant intended to steal. Lankford came into their camp wielding a shotgun which must have ultimately led to Mr. Bravence's (who was a captain in the United States Marine Corps) subservient compliance with Lankford's brother's order to kneel on the ground where he was bludgeoned to death. Jurors could reasonably have inferred that Mr. Bravence complied with the demand to kneel on the ground because of the defendant's menacing display of the shotgun. After Mr. Bravence was mortally wounded, Mrs. Bravence returned from the creek. She was ordered onto the ground and unmercifully killed by a blow to the head without a word of protest from Lankford. Although

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Idaho 169, 418 P.2d 210 (1966); *State v. Gish*, 87 Idaho 341, 393 P.2d 342 (1964); *State v. Clokey*, 83 Idaho 322, 364 P.2d 159 (1961); *State v. Burris*, 80 Idaho 395, 331 P.2d 265 (1958); *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957); *State v. Buchanan*, 72 Idaho 365, 252 P.2d 524 (1953); *State v. Owen*, 73 Idaho 394, 253 P.2d 203 (1953) (considered only in terms of crime committed and penalty imposed; overruled on substantive law point in *State v. Shepherd*, 94 Idaho 227, 486 P.2d 82 (1971)); *State v. Pettit*, 104 Idaho 601, 661 P.2d 767 (Ct.App.1983); *State v. Fenley*, 103 Idaho 199, 646 P.2d 441 (Ct.App.1982).

Lankford testified that he did not intend that the Bravences die, Lankford not only participated in the murders, but he did nothing to prevent his brother from bludgeoning Mrs. Bravence after he had witnessed the savage consequences of the nightstick attack on Mr. Bravence. The attack was brutal and one that could only have been intended to kill the victims because of the severity of the blows. The district court judge was entirely justified in finding from these facts that Lankford was a major participant in the killings and that he intended that the Bravences die.

The character and nature of Lankford leads to the conclusion that he was an extremely dangerous person. The fact that the murders were committed while Lankford was in violation of parole on a robbery charge in Texas, and was fleeing from the authorities, indicated to the sentencing court that he has little respect for the law or for fellow human beings, and the record substantiates this finding.

Our review of similar recent cases demonstrates that Lankford's acts can be easily aligned with other Idaho cases in which the death penalty was imposed. In *State v. Gibson*, 106 Idaho 54, 675 P.2d 33 (1983), and *State v. Paradis*, 106 Idaho 117, 676 P.2d 31 (1983), the nature of the crime and the character of the defendants were similar to this case. The murders in those cases were not only brutal, but the defendants had, like Lankford, prior criminal records. In *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983), defendant viciously murdered his female victim who was a former co-worker. Sivak, like Lankford, had a prior criminal record. In these and other recent cases the aggravating circumstances surrounding the commission

of the crime far outweighed any mitigating circumstances.

In *State v. Aragon*, 107 Idaho 358, 690 P.2d 293 (1984), we stated:

> "We acknowledge the trial court's superior ability to observe witnesses and their demeanor during the sentencing phase of a trial, and especially the unique ability of the trial judge to observe the character and demeanor of the defendant, a tool essential to the ultimate goal of tailoring a sentence to a particular defendant. With that unique ability of the trial court in mind, we have determined that the sentence imposed in the present case is not out of proportion to the sentence heretofore imposed." 107 Idaho at 369, 690 P.2d at 304.

We find that the trial court exercised this unique ability, understood the record in detail, and acted in accordance with Idaho statutory procedure to sentence the defendant to death.

The judgment of conviction and the sentence imposed are affirmed.

SHEPARD, C.J., and DONALDSON and HUNTLEY, JJ., concur.

HUNTLEY, Justice, concurring.

While concurring in the majority opinion, I do so with the reservation that I remain convinced that Idaho's death sentence procedure, in failing to utilize the jury in the process, violates the Idaho Constitution for the reasons I have stated in *State v. Creech*, 105 Idaho 362, 670 P.2d 463 (1983), and, *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983).

Additionally, I agree with United States Supreme Court Justice John Paul Stevens and Justice Bistline that achievement of proportionality and the imposition of the death penalty only in appropriate cases can best be obtained when the decision to impose that penalty is made by a jury rather than by a single governmental official.

Judges should resist the constant temptation our offices present to arrogate power unto ourselves to the detriment of the jury system.

BISTLINE, Justice, concurring only in affirming the verdict and dissenting.

I.

The most important issue at stake here was the last dealt with in the majority opinion, Part IV(3): "Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[1] The majority, in its footnote 14, runs off its usual routine string of cases in support of its routine declaration that "we have reviewed the sentence imposed and the sentences imposed in similar cases in an effort to assume that the sentence in this case was not excessively disproportionate." Added to that strong of cases for the first time, and prominently

[1] A discussion of Part IV(3) necessarily includes comment on that portion of Part IV(2) where the majority, at p. 703, 747 P.2d at p. 725, upholds what it misreads as aggravating Finding No. 4: "That the defendant's acts were accompanied by a specific intent to kill."

heading the list, are *State v. Windsor*, 110 Idaho 410, 716 P.2d 1182 (1985), and *State v. Scroggins*, 110 Idaho 380, 716 P.2d 1152 (1985), *State v. Beam*, 109 Idaho 616, 710 P.2d 526 (1985), and *State v. Fetterly*, 109 Idaho 766, 710 P.2d 1202 (1985). The majority opinion, however, contains surprising [sic] little informing the reader as to what dispositions were made in the string of cases cited, and especially with regard to the two last cited, or how Lankford's death-deserving conduct measured up to the death-deserving and death-undeserving conduct in the string, other than this much:

> Our review of similar recent cases demonstrates that Lankford's acts can be easily aligned with other Idaho cases in which the death penalty was imposed. In *State v. Gibson*, 106 Idaho 54, 675 P.2d 33 (1983), and *State v. Paradis*, 106 Idaho 117, 676 P.2d 31 (1983), the nature of the crime and the character of the defendants were similar to this case. The murders in those cases were not only brutal, but the defendants had, like Lankford, prior criminal records. Majority op., p. 704, 747 P.2d, p. 726.

All that the majority does in its proportionality review is to portray the conduct of Lankford in connection with the killing of the Bravence couple from which it is concluded that: "The district court judge was entirely justified in finding from these [recited] facts that Lankford was a major participant in the killings and that he intended that the Bravences die." Majority op., at p. 704, 747 P.2d at p. 726. The majority opinion appears to be patterned after that of the Arizona Supreme court in its second review of the *Raymond Tison* case on post-conviction proceedings:

> Intent to kill includes the situation in which the defendant intended, contemplated, or anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony. *State v. Raymond Tison*, 142 Ariz. [454] at 456, 690 P.2d [755] at 757 [1984].

Felony murder is first degree murder, and it can merit life imprisonment. Felony murder is not, however, necessarily premeditated first degree murder, which can merit the death penalty. The majority opinion correctly reports that the district court ruled that there was a specific intent to cause the deaths of the victims, BUT, the majority avoids taking note that the trial court was careful not to make a finding that such intent was attributable to Bryan Lankford and instead made this finding:

> (d) The murders were defined as murder of the first degree by Idaho Code Section 18-4003(d), and the murders were accompanied with the specific intent to cause the deaths of Mr. and Mrs. Bravence. R., p. 348.

That language, beyond any doubt, may have application to the conduct of Mark Lankford, as described by Bryan Lankford. The majority opinion recites that "Lankford testified that he did not intend that the Bravences die," which is correct. He also testified that he did not know in advance what Mark Lankford had in mind, other than the stealing of a vehicle:

> The Defendant testified at his trial that he and his brother decided to leave Idaho because it got cold . . . He further testified that his brother, Mark Lankford, decided to steal a van and talked Defendant into going along with the theft. . . . The Defendant testified that he never planned on shooting anyone, though he did

> carry the shotgun into the campsite at his brother's request. . . . He then testified that while he was talking to the man (Robert Bravence), Mark Lankford came out of the bushes and told the man to get down on the ground. . . . Mark Lankford then hit the man over the head with a club. . . . When Mrs. Bravence came up from the river, Mark Lankford told her to get down on the ground and upon doing so, Mark Lankford hit her across the back of the neck. . . . The Defendant and Mark Lankford then picked up the Bravences and placed them into the van. . . . The Defendant then drove the van back to the Lankford's former campsite. . . . Upon arriving at the area, the Defendant stayed in the car because he was "hysterical", "crying and very upset" while Mark Lankford took the people into the woods. . . . The Defendant did not think that the people were dead at the time that Mark Lankford carried them into the woods. . . . The Lankfords then drove to Oregon. . . . The Defendant further testified that he signed charge receipts at the Holiday Inn in Wilsonville and other places because his brother told him to do so. . . . The Defendant further testified that Mark did not generally get along with people because he was violent and had a very bad temper most of the time. Defendant's Brief, pp. 6-7.

The foregoing is excerpted from the Defendant's Brief. It compares favorably with the majority's recitation, pp. 691-692, 747 P.2d pp. 713-714.

There is here, then, no contention, and also no jury finding, that Bryan Lankford delivered any of the death blows.[2] The majority upholds the imposition of the death

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[2] This will be discussed *infra* in connection with Part I(e) of the majority opinion, which deals with instructions and

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penalty upon being able to see validity in the judge's finding, as rewritten by the majority, that Bryan Lankford "intended that the Bravences die." This misstatement of what the trial judge actually wrote is blatant and inexcusable, but serves the majority's purpose in choosing language which the majority prefers to believe was what the district judge really meant to say – so as to be brought in conformance with *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 – which is barely mentioned in the majority opinion,[3] although it was thoroughly discussed in the *Windsor* majority opinion, *Windsor, supra*, 110 Idaho at 418-19, 716 P.2d 1182.

The majority closes its cursory proportionality review with a quotation from *State v. Aragon*, which is delivered much as a blessing might be:

> We acknowledge the trial court's superior ability to observe witnesses and their demeanor during the sentencing phase of a trial, and especially the unique ability of the trial judge to observe the character and demeanor of the defendant, a tool essential to the ultimate goal of tailoring a sentence to a particular defendant. With that unique ability of the trial court in mind, we have determined that the sentence imposed in the present case is not out of proportion to the sentence heretofore imposed. *State v. Aragon*, 107 Idaho 358, 369, 690 P.2d 293, 304 (1984).

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particularly the failure to give defendant's Requested Instruction No. 4.

[3] Even more strange is the majority's decision to give no consideration to *Tison v. Arizona*, ___ U.S. ___, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). Its content was discussed by counsel at oral argument and is more applicable than *Enmund*.

The Court's opinions in the cases of *Windsor* and *Scroggins* failed to acknowledge the trial court's superior ability, and did not keep in mind that "unique ability." To the contrary, the Court, in *Windsor* and also in *Scroggins*, came out with a "newly enunciated doctrine of" paramount exercise of discretion which resulted in a Supreme Court " 'qualitative review' of the record" from which "the Supreme Court determined that the sentence of death in the *Windsor* and *Scroggins* cases were excessive and disproportionate." Those quotations are, of course, taken directly from the eloquent order of disqualification authored by the Honorable Edward J. Lodge, the district judge who presided in the *Windsor* case and also in the *Scroggins* case, where in both cases he had imposed a sentence of death. Judge Lodge wrote courageously and concisely on the requirement of proportionality, and this Court's debasement of that doctrine. And Judge Lodge wrote from a position where only he was best positioned to make an assessment that was direly in need of being made. He had also, using his own words, "accepted that awesome responsibility" in imposing the death sentence on Fetterly, who was Windsor's co-defendant charged, tried, and convicted for the murder of Sterling Grammer, and also in imposing the death penalty on Beam, who was Scroggins' co-defendant charged, tried, and convicted for the murder of thirteen-year-old Mondi Lenten. Because the issue presently under address is proportionality, and because on previous occasions I have been impelled to the view that Idaho will only achieve any degree of reasonable proportionality in capital sentencing

by restoring to the jury "that awesome responsibility," it is clearly in order that in Judge Lodge's own words the circumstances of *Windsor* and *Scroggins* be submitted to a candid world:

"Idaho Code Section 19-2827(c)(3) is seemingly clear in providing that the responsibility of this state's Supreme Court in reviewing a death sentence is to ascertain whether a death penalty is 'excessive' or 'disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant,' and *not* that the appellate court exercise what has been referred to as a 'qualitative discretionary review' or an 'independent review.' With all due respect, it is difficult for this court to believe that such a 'qualitative review' undertaken by the Supreme Court is more legitimate than the trial court's assessment after having personally participated in all the proceedings and having had the firsthand opportunity to evaluate the facts, circumstances, and persons involved in a capital case, particularly when two members of the Supreme Court are predisposed to find against the legitimate imposition of a death sentence when it is prescribed by the court as opposed to a jury. Rather, the decision making responsibility always has been and always should be in the trial court, and only when there is determined to be an *abuse* of that discretion should an appellate court intercede. The United States Supreme Court held in *Spaziano vs. Florida*, [468 U.S. 447] 104 S.Ct. 3154 [82 L.Ed.2d 340] (1984), that sentencing by a trial judge satisfied both the Sixth and Eighth Amendments because 'a trial judge is more like a jury than he is like an appellate court. Like a jury, he has seen the witnesses and is well positioned to make those determinations of

demeanor and credibility that are peculiarly within a trial judge's province.' The same can be said for all the nuances involved in the trial of a capital case which are not 'in the record,' but which are within the observations and knowledge of the trial judge, including community outrage and/or tolerance, community expectations and societal goals, the rights and needs of a victim's family, and the totality of the circumstances surrounding the defendant.

"The records in the *Windsor* and *Scroggins* cases amply support the determination that both defendants *personally intended that their victims suffer death*, a finding make by both the trial court and the jury which satisfies the Eighth Amendment as well as the rule of *Enmund vs. Florida*, 45 [458] U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140] (1982). Yet, *even though findings regarding the personal responsibility and moral guilt of each defendant were made by the trial court and are supported by the evidence, these defendants have escaped punishment for their actions equivalent to that imposed on their co-defendants*, whose death sentences have been affirmed on appeal. Despite a record which strongly indicate that in their respective cases both Scroggins and Windsor were *the* motivating forces behind the commission of the crimes and were in fact the catalysts which set the crimes in motion, a situation has resulted which suggests that 'where the death of another is attempted by two people . . . , he or she who was less successful must yield the hangman's noose to the one to whom must go the honor of inflicting the blow or wound which gains the medical credit for producing the victim's expiration.' 85 I.S.C.R. at 2566 (Justice Bistline's separate opinion). *In both cases it is clear that Windsor and Scroggins*

knew that the victim was to be killed and were actively and inextricably entwined in the victim's fate. With the possible exception of the Creech cases, where there have been multiple deaths, this court is not aware of any murder case in this state where the death penalty has been upheld which would offend the average person more than the facts presented in *Windsor* and *Scroggins*.

"In the *Windsor* opinion the Supreme Court maintained that Windsor's level of participation in the crime was sufficiently different from that of her co-defendant Fetterly so as to justify the disparity in their sentences. Additionally, certain other factors were cited: her lack of formal criminal record; the lack of significant prior criminal activity; the lack of evidence regarding any history of violent behavior or propensity toward violence; her cooperation with authorities both after arrest and during incarceration; her troubled childhood; and her strong rehabilitative potential. *This review glossed over the facts of Windsor's actual involvement* in bringing about Sterling Grammer's death and instead emphasized the mitigating factors which were thoroughly considered by this court and found not to outweigh the aggravating factors.

"Identified in the *Scroggins* opinion as justification for vacating the death sentence was *Scroggins'* lesser criminal involvement in the killing of thirteen-year-old Mondi Lenten, compared to that of co-defendant Beam, as well as his unstable upbringing, mental and chronological age, level of cooperation, and lack of history of violent criminal conduct. However, the record in this case supports the conclusion that any disparity between Scroggins' and Beam's participation is a distinction with little difference. It is true that the Scroggins jury did not

find him guilty beyond a reasonable doubt of slitting his victim's throat, but neither did the jury so find in Beam's case; yet it most certainly happened, and both defendants are legally responsible. Additionally, while Scroggins was convicted of the included offense of Attempted Rape and Beam was convicted of Rape as charged, the *Scroggins* verdict must be viewed in light of the evidence. It is inconceivable to this court that Scroggins should be given any consideration in the sentencing process for the disparity in the verdicts when the only reasonable explanation for Scroggins' not accomplishing the rape, in light of all the other evidence, was that his victim, in a final and desperate measure, forced a bowel movement in the hope that the excrement would turn Scroggins away, and when the evidence indicates that he still forced her to commit an act of fellatio on him. Also, the fact that Scroggins reported the crime has to be viewed in context in order to see it for what it was. First, Scroggins when [sic] home and went to sleep with no pangs of conscience after having been involved in a brutal slaying. The next day, under parental influence, and with co-defendant Beam on the run and a handy 'fall guy,' Scroggins went to the police. No one involved in this case – police, investigator, the jury, or this court – has ever found or believed that Scroggins told the truth about what happened to Mondi Lenten, except to the extent that he did lead the police to the crime scene, which he of course had to do in his attempt to place the blame on Beam, his supposed friend. Additionally, while the Supreme Court's opinion suggests that the trial court weighted Scroggins' likely performance in a penal setting more heavily than it in fact did in support of the decision to impose a death sentence, a

recent check with the warden of the Idaho State Penitentiary demonstrated that this court's assessment was borne out upon Scroggins' release from death row, whereupon his conduct caused him to be first placed in the 'hole,' and then in close or protective custody. Finally, this court carefully considered the mitigating factors identified by the Supreme Court in its opinion prior to determining at the time of sentencing that the mitigating factors did not outweigh Scroggins' culpability for the crime and the nature of his character.

"The Crimes committed by both Scroggins and Windsor were accomplished under such circumstances that reasonable minds could not differ about the fact that there was in each case a knowing and final betrayal by the defendant of any respect for human life. Even after a careful consideration of the mitigating factors in their respective cases, it was and still is the conclusion of this court that these mitigating facts do not outweigh the aggravating factors. While a defendant may demonstrate a change of heart once he or she is cornered, may become cooperative, may display some rehabilitative potential, and may work within the system to emphasize his or her good points and to obscure the bad ones, these factors in and of themselves must not automatically overshadow a defendant's culpability for the crime which has been committed and for the life which he or she has previously led, if there is to be any validity to the sentencing objective of protecting society in addition to serving the interests of a defendant. Further, where a court must give a disproportionate amount of weight to matters which occur after the commission of a crime, *there never will be proportionality in sentencing between the advantaged and the disadvantaged."*

Order of Disqualification, *State v. Windsor* and *State v. Scroggins*, pp. 3-10 (emphasis added).

My opinion filed in the *Windsor* case demonstrates that my views were the same as those of Judge Lodge. At page 428 of 110 Idaho, 716 P.2d 1182, I wrote:

> The majority makes much of Windsor's childhood and her background in general. All of these factors were first considered by the trial judge. The fact remains that, just as the judge observed, two people, Windsor and Fetterly, set out together on this crime spree which culminated in the death of their selected victim. This is not an *Enmund* situation – not even a distant cousin of *Enmund*.

and, at page 432, 716 P.2d 1182;

> Here we have no driver of a get-away car – completely detached from the scene of a murder-in-progress. Hence, I see no necessity for the majority's considerable exertion in reaching the conclusion that "there is no merit to Windsor's contention that the imposition of the death penalty was constitutionally impermissible under the mandate of *Enmund*.

The majority, in its *Windsor* opinion, nevertheless found justification for allowing her to escape the death penalty which had also been meted out to Fetterly, and *affirmed*, in the disparate sentences imposed on Bainbridge, *State v. Bainbridge*, 108 Idaho 273, 698 P.2d 335 (1984), and Sivak, *State v. Sivak*, 105 Idaho 900, 674 P.2d 396 (1983), and likewise the sentences imposed on McKinney, *State v. McKinney*, 107 Idaho 180, 687 P.2d 570 (1984), and Small, *State v. Small*, 107 Idaho 504, 690 P.2d 136 (1984):

> In both sets of cases, the defendant who did the actual killing was given the death penalty while

> his co-defendant received a life sentence. The difference in their degree of participation in the crime appeared to be the primary factor justifying the disparity in sentences in both sets of cases. *Windsor, supra,* 110 Idaho at 421, 716 P.2d 1182.

The majority in *Sivak* upheld the imposition of the death penalty, and had the effrontery to observe that:

> I.C. § 19-2827 requires us to conduct a review of the record to determine if this particular death sentence resulted from any arbitrary factors, such as passion or prejudice. That section also requires us to determine if the sentence imposed in this particular case is excessive or disproportionate to sentences imposed in similar cases. Our independent review of this case does not reveal any indication of existence of arbitrary factors. *Our review of similar cases involving the death penalty, while necessarily limited by the lack of such cases, as noted in State v. Creech, supra, does not reveal the presence of any particular excessiveness or disproportionality in this particular case.* The heinous nature of the crime committed in this case, and the nature and character of the defendant, makes the imposition of the death penalty in this case both proportionate and just. *Sivak, supra,* 105 Idaho at 908, 674 P.2d 396 (emphasis added).

But, the majority not at that time incorporating a string citation of cases reviewed, artfully ignored *State v. Major,* 104 Idaho 4, 665 P.2d 703 (1983), a first degree *premeditated* murder conviction – a brutal stabbing – where the death sentence was not imposed. Equally ignored was a companion case to *Sivak,* namely *Bainbridge, supra,* where the death penalty was not imposed. Nor can it be said in

defense of the *Sivak* majority that omission of any comparison to *Major* and *Bainbridge* was inadvertent. My own opinion rather forcibly brought those other cases to the fore:

> It is difficult, if not impossible, to reconcile the two sentences. One murderer dies; the other lives. This is a classic case of the disparity in sentencing which produced *Furman* and in turn led to the second series of cases four years later wherein the Supreme Court declared that *Furman* had been misunderstood, while Idaho in the interim destroyed death penalty sentencing procedures which would today be entirely valid according to my own reading of the "threshold theory" which the Supreme Court now retreats to in *Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). I am not critical of Justice Stevens' opinion – which was expected. At the same time I agree with the view of Justice Marshall that "the States may as well be permitted to re-enact the statutes that were on the books before *Furman.*" 462 U.S. at 910-11, 103 S.Ct. at 2760. For, as I have stated and written even prior to receiving *Zant,* Idaho's procedure in capital sentencing did not lead to arbitrary and capricious imposition of death sentences. Well instructed juries would hear evidence offered in mitigation and in aggravation, and would decide between life or death. Bifurcation of the guilt phase from the penalty phase would serve to avoid undue prejudice to a defendant charged with first degree murder. *Sivak, supra,* 105 Idaho at 914, 674 P.2d 396.

In that opinion, writing primarily for the education of the majority who did not seem to be aware of *Bainbridge,* the involvement of both Sivak and Bainbridge, highly similar to the joint involvement of Fetterly and Windsor, and also

to the joint involvement of Scroggins and Beam, it was pointed out that:

> Two men, Sivak and Bainbridge, were found guilty of first degree murder which was committed in the course of a planned robbery of a gas station attendant who was acquainted with both and who could have identified both individuals. The attendant, a woman but a few years older than the defendants, was stabbed twenty times and shot three times – a brutal murder if ever there was one. The two were jointly charged, as they should have been, given a preliminary hearing, and held to answer. A single information was filed charging them jointly with armed robbery, premeditated murder, and murder in committing a felony of robbery, as they should have been charged. Neither made a motion for separate trial, apparently being unable to show the prejudice required by our case law, and they should have been tried together. But they were not so tried. One defendant, Bainbridge, filed an affidavit of disqualification against Judge Newhouse, who thereupon disqualified himself as to Bainbridge only, for which there may or may not be precedent in some other jurisdiction. In any event, Judge Newhouse assigned Bainbridge's trial to Judge Rowett. In that strange manner the co-defendants were not tried together as they should have been for the crimes the two of them committed, but the results of the guilt trials came out the same, as both were convicted of first degree murder. There is little doubt in my mind, after reviewing the facts and circumstances of the crimes, that had they been tried jointly and had the jury been the sentencer both would have suffered the same fate. But they were not tried together for their jointly committed crimes as they should have been, and a jury was not the sentencer as should have been the case. As it stands now, one dies and one lives. If

this is not disparate sentencing, then I do not expect to ever see it.

The two co-defendants were not only bungling criminals and inept, and thus brutal murderers, but also not loyal to each other. Sivak, who testified at his trial, claimed that Bainbridge did all of the robbing and murdering while he, Sivak, was merely in the company of Bainbridge at a poor time. Bainbridge, who did not testify at his trial, gave taped statements to the investigating officers which, on his turn to talk, blamed the entire criminal activity on Sivak, Bainbridge by misadventure merely happening to be with him at the wrong time and place, as it turned out. There were no other witnesses to the crime of murder than these two defendants. The two different juries convicted both of first degree murder and robbery, Sivak testifying to his innocence, Bainbridge not taking the stand. Neither testified at the other's trial. Notwithstanding like jury verdicts the district judges involved imposed the drastically different sentences for the same crime of murder. As acknowledged in the majority opinion in Part II B, Judge Newhouse in Sivak's case made a § 19-2515 finding that "[t]he defendant dominates his co-defendant and is primarily responsible for all that occurred." The majority, notwithstanding the provisions of I.C. § 19-2827, makes no mention of the penalty imposed in *Bainbridge*, and strangely does not mention the complementing findings of Judge Rowett in Bainbridge's case that "[a]though he had the opportunity and the encouragement of the co-defendant to do so, defendant did not himself inflict any death threatening wounds on the victim," and "that defendant did not himself deliver any death threatening blows to the victim. . . . " *Id.* at 915-16, 674 P.2d 396.

Following which, on the issue of required proportionality, I added my assessment in regard to *Sivak* and *Bainbridge* which, I am gratified to be able to say now, is much the same as Judge Lodge's post-mortem review of *Windsor* and *Fetterly* following this Court's setting aside of the death penalty imposed on Windsor:

> Now, a large difficulty with these two cases and the disparity in penalties imposed, is an inability to see how it would make any genuine difference which of the two defendants delivered the more telling blows, knife wounds, or shots against and into their helpless victim. The cold inescapable fact is that *they* murdered her, and that the two district judges, neither of whom ever heard Bainbridge testify as to the circumstances of the crime, and only one who heard Sivak testify, could both to a degree exonerate Bainbridge at Sivak's fatal expense is regrettably to my mind unacceptable. Moreover, it highlights and bizarre results of having two separate trials where there should have been a single trial, and drives home the importance of adhering to jury death sentencing as is a defendant's right under the Idaho Constitution. *Id.* at 916, 674 P.2d 396.

Judge Lodge, where proportionality is involved, performed a great service for the State of Idaho in speaking out against this Court's disparate sentencing in *Windsor* viz-a-viz *Fetterly*, and in *Scroggins* viz-a-viz *Beam*. had he also written of Sivak and *Bainbridge*, an even greater service would have occurred. It is, in my view, of extreme importance that this Court, and the legislature, be given the considered concensus of the state's district judges in the area of capital sentencing. To date, other than for Judge Oliver's rebuke of this Court's reversal of a death

sentence imposed by him, *see State v. Osborne*, 104 Idaho 809, 823, 663 P.2d 1111, 1125 (1983) (Bistline, J., concurring and dissenting), only Judge Lodge has let his views be known, and then only when his conscience so motivated him. It is to be remembered that only in recent years have the state's district judges had thrust upon them that "awesome responsibility." In speaking out against this Court's reversal of the death sentence in *Windsor*, Judge Lodge noted that, in evaluating the wisdom of appellate court sentencing, "a trial judge is more like a jury than he is like an appellate court. Like a jury, he has seen the witnesses and is well positioned to make those delineations of demeanor and credibility that are peculiarly within a trial judge's province." He was quoting from *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). Because a jury is more like a jury than is a trial judge like a jury, and speaking as one member of this Court, I express the view that everyone involved in capital sentencing, at whatever level, would greatly benefit if the views of Judge Lodge were made available, together with those of all the state's district judges, on the appropriate comments of United States Supreme Court Justice John Paul Stevens, also writing in *Spaziano*, and joined by two other justices. His beliefs are more readily available in *state v. Stuart*, 110 Idaho 163, 179-81, 715 P.2d 833, 849-51 (1985) (Bistline, J., dissenting). In sum, Justice Stevens stated it thus:

> "In the 12 years since *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively

different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense. Because it is the one punishment that cannot be prescribed by a rule of law as judges normally understand such rules, but rather is ultimately understood only as an expression of the community's outrage – its sense that an individual has lost his moral entitlement to live – I am convinced that *the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury rather than by a single governmental official.* This conviction is consistent with the judgment of history and the current consensus of opinion that juries are better equipped than judges to make capital sentencing decisions. *The basic explanation for that consensus lies in the fact that the question whether a sentence of death is excessive in the particular circumstances of any case is one that must be answered by the decision maker that is best able to 'express the conscience of the community on the ultimate question of life or death.' Witherspoon v. Illinois,* 391 U.S. 510, 519, 88 S.Ct. 1770, 1775, 20 L.Ed.2d 776 (1968) (footnote omitted).

. . . .

"Thus, the legitimacy of capital punishment in light of the Eighth Amendment's mandate concerning the proportionality of punishment critically depends upon whether its imposition in a particular case is consistent with the community's sense of values. Juries have historically been, and continue to be, a much better indicator as to whether the death penalty is a disproportionate punishment for a given offense in light of community values than is a single judge. If the prosecutor cannot convince a jury that the defendant deserves to die, there is an unjustifiable risk that the imposition of that punishment will not reflect the community's sense of the

defendant's 'moral guilt.' " *Spaziano, supra,* 104 S.Ct. at 3167-78 (footnotes omitted). *State v. Stuart,* 110 Idaho 163, 179-81, 715 P.2d 833, 849-51 (1985) (emphasis added).

That which is also missing from the majority opinion is any discussion comparing Bryan Lankford's conduct with that of his brother, Mark Lankford, notwithstanding, as was equally true in *Sivak,* where we had the record on appeal here in the clerk's office, we also have the record in the Mark Lankford case. Should proportionality be considered as it was by the majority in *Windsor, i.e.,* her culpability as compared to Fetterly's, or should it be as it is today, comparing the murder of the Bravences in relation to the murders perpetrated by Paradis and Gibson? On this sad state of affairs, I continue to find appropriate my final remarks in the *Stuart* case:

As I wrote in *Sivak* or *Bainbridge,* the proportionality requirement prescribed by the Supreme Court and in turn adopted by the Idaho legislature is virtually meaningless. Proportionality in capital sentencing in Idaho will only result *when first degree murder charges are all tried to a jury,* and the jury also as the conscience of the community makes the awesome decision of life or death where a first degree murder verdict is returned.

How there can ever be any real proportionality continues to escape me where prosecutors exercise a divine right to reduce the charge and to ask or not ask for the death penalty, as may at the moment so move them. Recently, the citizens of Ada County were given to understand that the prosecutor had decided that on a guilty plea to the execution-style murder of a girl in her twenties, *he* would not ask for the death penalty. Other defendants so accused do

> not fare so well. Such matters are not for mortal prosecutors, but for mortal jurors. *Id.* at 202, 715 P.2d 833 (emphasis original).

With Windsor, Scroggins, Bainbridge, and Osborn having escaped the death penalty by reason of the (erroneous) grace of this Supreme Court, how is it that in the name and pursuit of proportionality, the remittiturs are not recalled and proportionality meted out as it should be. Precedent is not lacking. *State v. Ramirez*, 34 Idaho 623, 203 P. 279 (1921), which was discussed most recently in *State v. Stuart*, 110 Idaho at 228-29, 715 P.2d 833 (Bistline, J., dissenting on rehearing).

II.

The majority's overuse of literary license in regard to Bryan Lankford's "numerous confessions regarding the killings," at p. 692, 747 P.2d at p. 714, merits some comment in passing. Putting aside the loose use of "confessions," "admission" and "statements" as though the same are interchangeable, it would seem to me that if the majority has found in this voluminous appeal record any confession by Bryan Lankford to his killing of either of the Bravences, it would be put on display without the least hesitation, just as the majority did, and accurately set out a synopsis of his testimony at trial. Where the majority asserts that there are such confessions, admissions, and statements without any elaboration or explanation as to content, it can only be assumed that it is a ploy ful play on words. The robbery was undoubtedly what led to the killings, hence, if Bryan Lankford conceded his complicity in the robbery, which he did by his own testimony, the majority is able to leave the reader

believing that his statements, admissions, and confessions were that he participated in the killing. Seeing no reason for such shenanigans in writing a decision in a death penalty case, with some trouble I have located the oral recitation of the "written confession to an FBI agent." Working in Texas, he became aware that the Bravences were missing, and last seen in Idaho, and ultimately got involved with Bryan and Mark Lankford at the Sheriff's office in Liberty County, Texas, where the two Lankfords were jailed. He testified only as to his interview with Bryan and a *statement* signed by him, and the discussion which led up to it. The statement was marked as Exhibit 76, admitted into evidence by the court, there being no objection, but Exhibit 76 does not seem to be amongst the exhibits. Mr. Ploeger, the agent, read it in giving his testimony after first detailing how it was procured:

BY MR. ALBERS:

Q. Let's try again. How did the interview progress? What happened within the interview?

A. Okay. I interviewed him told him what we wanted to talk to him about and so forth. He told several stories; and, then, we ultimately prepared a signed statement.

Q. And how was it that one particular story got prepared in writing?

A. Well, the first story Mr. Bryan Lankford told was that he and his brother Mark had gone from the Houston area to Canada where Mark's car had been stolen. That they'd gone to Canada in Mark's car and it had been stolen. That didn't wash. I didn't believe it. I pointed out that Bryan's fingerprints had been found in the Bravence van, and he had to have been in it at one time or another, and he said: Okay. The second

story was that: yeah, we up there, we were camping in Idaho. We didn't want to use Mark Lankford, my brother's car anymore, so I stayed in the camp, Mark left for a few hours, came back with a green van and we went on.

And I told him that wouldn't wash because his handwriting and fingerprints had been found on credit card receipts and so forth from the use of the Bravence credit card. The second time he said: Okay. I'll tell you the truth, the whole story. And that's when we started the signed that statement.

Q. And how did you go about preparing such signed statement?

A. I set out and lettered out in narrative form. I'd say: Well, what happened next. . . . and I'd write a sentence, and then say: What happened next. . . . and I just set and wrote it out. And at the end he read it and accepted my words, if you will, and signed it and wrote a little paragraph at the end of it.

Q. This document is in your longhand?

A. Yes, sir.

Q. And it bears some of his longhand?

A. Yes, sir.

Q. Did he have an opportunity to look at each page?

A. Yes, sir. He read and initialed each page and signed the last page.

Q. What happened to that original document?

A. It was presented here in court several months ago.

Q. Calling to your attention what's been marked for identification as State's Exhibit No. 76, what is that?

A. This is the signed statement we prepared on October the 7th, 1983, at Liberty County, the one that Bryan Stuart Lankford furnished to me.

Q. How many pages is it?

A. Six pages.

Q. Do you recognize each of the six pages?

A. Yes sir. My handwriting is on each of the six pages.

Q. You indicated there were initials of Bryan Lankford on the pages, where do those appear?

A. Yes, sir. They appear at the top left where each page was started, at the bottom right where each page was ended.

Q. On the last page does there appear any handwriting of Bryan Lankford?

A. Yes, sir. On the last page Bryan's initials appear at the top left. He signs it at three quarters of the way down the page; and, then, I signed it as Larry Allen did as witnesses to the statement.

Q. Is there a discernible change in the handwriting?

A. Yes.

MR. ALBERS: Move the admission of Exhibit No. 76.

MR. LONGETEIG: No objection.

THE COURT: 76 will be marked into evidence.

(Thereupon State's Exhibit No. 76 was marked into evidence by the deputy court clerk.)

BY MR. ALBERS:

Q. Mr. Ploeger, since this is in your handwriting, could you read that for us?

A. Yes sir: Liberty, Texas, October the 2d, 1983, I Bryan Stuart Lankford make the following free and voluntary statement to Federal Bureau of Investigation Special Agent Dennis L. Ploeger, and Liberty County, Texas Deputy Sheriff Larry Allen.

Special Agent Ploeger furnished me with a form captioned Interrogation Advice of Rights that I read, understood, and signed.

I finished the eleventh grade in school, got a GED certificate, and can read and write the English language.

Sometime in early June, 1983 Mark Lankford, my brother, came to Conroe, Texas where I was staying with my uncle, Kenneth Lankford, at 117 Lidian (phonetic) Street. I was planning to leave the area, and I called Mark to tell him I was leaving. Mark said he was going to leave the area also, so he came to Conroe from Houston, Texas, where I called him, and we left Conroe together.

We traveled in Mark's brown Chevrolet Camaro Z28, and Mark did all the driving. I had money for gas. We went through Oklahoma, Kansas, Wyoming, and possibly one or two other states before arriving in Idaho. Mark and I camped between Golden and Elk City, Idaho when we got to Idaho. We were at the camp that is off a dirt road on the side of a mountain in the woods. It was high on the mountain, and it snowed every day. After about two weeks Mark

and I decided to leave the area. We had hidden Mark's car under brush near our campsite earlier. Mark wanted to leave the car because it had Texas license plates and he was afraid that he would be stopped, and he had not been making payments on the car.

We left all our personal belongings in the car except for a small bag of clothes and a twelve gauge longtom shotgun, that I carried. We left the camp and were walking down the dirt road from the camp when a white man in tan Jeep picked us up and took us to the main road. We walked towards Golden, Idaho until we came to a campsite where a green VW van was parked. Mark said there was a easier way to travel than walking, and after about an hour of discussion, we decided to steal the VW van for transportation.

Mark and I walked into the camp where the VW van was parked. A white man and white woman were in the camp. I was carrying the above mentioned shotgun, and Mark told the man to get on the ground. The man did not get on the ground, but said take the money and the van and something like don't hurt us. Mark then hit the man over the head with a night stick, like a policeman uses. He had the night stick for a long time, and carried it in his car. The woman came up from a nearby creek about that time, and Mark told her to get on the ground. She said something about her husband being hurt on the ground; and, then, she got on the ground. Mark then hit the woman over the head with the same night stick that he had hit the man on the head with. I don't remember if Mark hit the man or woman once or more than once.

He then – we then put the camping gear of the man and woman into the VW van. The man and woman had a dog, but we left the dog at the

campsite. We then put the man and woman on the floor in the back of the VW van. It took both Mark and I to put them into the van. I then drove the VW van back to where Mark and I had been camped. Mark got out and took the man and woman out the side sliding door of the van and drug them off into the woods. I stayed in the van. Mark wanted to take the man and woman back to our old campsite. I am not certain, but we may have picked up some of our belongings. I don't remember any discussion about hiding the man and woman. I didn't know if the man and woman were dead when we took them to our old campsite. After that it was the middle or latter part of June, 1983 when Mark and I got the van and Mark hit them with the night stick, we went to Oregon; and, then, California in the van that belonged to the man and woman.

We used a Master Charge credit card in the name Robert Bravence, that we got from the glove box of the van, to buy gas, clothing, and at restaurants. I signed the receipts when we used the credit card, and some of the time I showed my driver's license in the name Bryan Stuart Lankford. The driver's license was in my wallet. I also signed the traveler's checks that we got from the glove box of the van that were in the name Robert Bravence. Some of the traveler's checks had a woman's name, so we threw them away. I don't remember if I threw them away or if Mark did, but we probably threw them away somewhere in San Francisco, California because it was the first big city we went into. I don't remember the name of any specific gas station, clothing store, or restaurant where we used the credit card or the traveler's check. But we purchased food, clothing, and gas with these items.

When we got to Los Angeles, California I called Roy Ralmuto in San Antonio, Texas, and

told him that Mark and I wanted to come stay with him. He sent us two bus tickets, and we went to San Antonio the last of June or early July, 1983. While I was waiting for the bus tickets Mark took the VW van, and later said he left it on the street with the keys in the can.

I have not talked to anybody about the above activity with the man and woman. I never called the Sheriff or anybody in Idaho to tell them where the man and woman were or that they may need help. I don't remember what Mark did with the night stick after he hit the man and woman. He may have left it at the campsite of the man and woman. He may have taken it back to where we had camped earlier. Or he may have thrown it out somewhere between the two camps. I believe we left the long tom shotgun I had at the camp of the man and woman in the VW van when it was abandoned in Los Angeles, California. We probably threw the credit card away.

And in Bryan Lankford's handwriting: I have furnished this six page statement free and voluntary. No force, threats, or promises were used to influence me to make the statement. I signed below and have initialed the other five pages. signed: Bryan Stuart Lankford. It's witnessed: Dennis L. Ploeger Special Agent FBI, Houston, Texas 10/2/83, and Larry Allen Detective Liberty County Sheriff's Office 10/2/84.

MR. ALBERS: No further questions.

Tr., Vol. 3, pp. 524-32.

The "confession" as I read it is not as inculpatory as to Bryan Lankford's involvement in the robbery as his trial testimony. As to murders, it is only inculpatory as to the carrying of the shotgun by Bryan Lankford, and portrays Mark Lankford as killing Captain Bravence while he was

on his feet pleading to be robbed only, and in turn killing Mrs. Bravence when she knelt to tend to her stricken husband. I do not agree with that statement being characterized as a written confession regarding the killings. A confession is generally defined as a statement acknowledging guilt of the offense charged. *See* Black's Law Dictionary, Fifth Ed., p. 269, where is also explained the distinction between a statement and a confession.

III.

A major concern is caused by the majority's handling of the court's failure to give defendant's Requested Instruction No. 4, set out in the opinion at p. 694, n. 4, 747 P.2d at p. 716, n. 4, and for facility of reading repeated here:

DEFENDANT'S REQUESTED
INSTRUCTION NO. 4

. . . .

> Answer this question only if you find the defendant, Bryan Lankford, guilty of Murder in the first degree.
>
> Do you find, beyond a reasonable doubt that Bryan Lankford himself killed, attempted to kill, or had any intent to kill either of the victims in this case?

The majority turns aside the challenge on the premise, unspoken, that it is irrelevant. Says the majority, "In Idaho it is the judge and not the jury who makes the determination of whether the death sentence will be imposed." What the majority necessarily must concede, however, is that this is a close case. The district court did

not make that finding, and so, as matters now stand, it has not been made.

The finding which was made, by a district judge fully informed as to Mark Lankford's conduct, having by the time of Bryan Lankford's sentencing presided over both trials,[4] was this:

> (d) The murders were defined as murder of the first degree by Idaho Code Section 18-4003(d), and the murders were accompanied with the specific intent to cause the deaths of Mr. and Mrs. Bravence. R., p. 348.

That is not by any stretch of the imagination the equivalent of a district court finding which, if the court found from the evidence, could have been couched in this suggested language: Bryan Lankford, although he himself was not the slayer of either of the victims, had the intent that the victims would be killed. Nor is it a finding that Bryan Lankford himself killed either of the victims, or attempted to kill them.

It would seem that there was no valid reason for the trial court's refusal to give the requested instruction. At the least, the consensus of the jury, who had heard the same evidence, would be, and should be, of great moral support when the court arrived at the moment of awesome responsibility when had to be made the decision between life and death. Moreover, the defendant was placing all the marbles on the line in asking for that

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[4] It is to be kept in mind that sentencing of Bryan Lankford was deferred until after the Mark Lankford trial at which he would testify, pursuant to a grant of immunity.

instruction. If the defendant was willing that the consensus of the jury might have been a *yes* answer, the court would have been spared some, if not much, of the agonizing of which District Judge Oliver lamented in *State v. Osborn, supra*, when he refused to conduct a second sentencing hearing, but instead imposed a life sentence without complying with this Court's mandate on reversal and remand.

There is no rule or principle which, even under the solicitor general's scheme for capital sentencing adopted by the legislature, nothing which forbids a district judge from getting advisory verdicts from a jury – much the same as is commonly and properly done in equity cases. And, notwithstanding how this Court has ruled, three to two, the district judges are well aware of other times, pre-*Furman* and pre-confusion, when the court instructed the jurors on the law and to the jury fell the awesome responsibility of imposing either a death or life sentence. District judges are sworn to uphold the Idaho Constitution, and while not free to disregard a majority opinion from this Court, are free to have and express their own views. If ever before *Furman* and *Woodson* there was any public or district judge clamor in Idaho to do away with jury sentencing in capital cases, it escaped the attention of anyone I know, and my own as well.

CONCLUSION

The extent of Bryan Lankford's participation in the actual killing will probably never be known. What is known is that he was a participant in the robbery and carried a shotgun. It can be said, too, that he watched the

killings, after which he aided his brother Mark Lankford in removing the bodies. It cannot be said on this record that he is bound by the state of mind of his brother. The Supreme Court of the United States in *Tison* set the proper guideline for the sentencing of Bryan Lankford.

> A critical facet of the individualized determination of culpability is the mental state with which the defendant commits the crime. . . . . A narrow focus on the question of whether or not a given defendant "intended to kill," however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. . . . Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

As I read again that which Judge Lodge wrote in refusing to further participate in the *Windsor* and *Scroggins* cases, and on rereading what I had to say in some of the other death penalty cases, it is seen that both Judge Lodge and myself are vindicated in our views on capital sentencing, and particularly culpability and intent.

I cannot believe that Beam absent Scroggins would have murdered their helpless victim. Nor can I believe that Fetterly absent Windsor would have murdered their helpless victim. Nor can I believe that Sivak absent Bainbridge would have murdered their helpless victim. Two people conspiring to commit a crime are essentially of the same temperament as a small lynch mob – doing in concert what one would not attempt alone.

In sum, I continue to agree with Justice Huntley that under the *Idaho* Constitution capital sentencing by a jury is required – a proposition weekly challenged by Justice Bakes and avoided by every other jurist in Idaho, and yet to be addressed by the solicitor general, who obviously *favors* judge sentencing – having authored the death penalty sentencing provisions adopted by the Idaho Legislature in the aftermath of *Furman* and *Woodson*. I entertain no doubt that Bryon [sic] Lankford is properly found guilty of felony murder, and that the verdict and judgment should be affirmed. Because the two Lankfords share an equal complicity in the planned robbery which culminated in two senseless murders – where there was obviously more regard for a dog than there was for human life, had the jury been given defendant's requested Instruction No. 4, or something similarly worded, and had the jury answered in the affirmative, my vote would unhesitatingly be to uphold the imposition of the death penalty. Had the jury been the sentencing authority as it is in 95% of the 50 states, my vote would be to affirm the death sentence, even though there may be here a lower "degree of participation in the crime" (*see* the rule of *Windsor, supra*, at 708-709, 747 P.2d at 730-731.) on the part of Bryon [sic] Lankford than there was on the part of M. Lankford. If the majority were to atone to Judge Lodge and to the criminal justice system for its *Windsor* and *Scroggins* opinion which destroyed all vestige of proportionality in capital sentencing cases, I would be more amenable to a majority opinion which did not leave standing in place the ratio decedendi by which the majority left Fetterly to be executed, while sparing Windsor, and left Beam to be executed while sparing the

far more culpable Scroggins. Had the trial judge recited firm evidence from which he was able to say not just that "the murders were accompanied with the specific intent to cause the deaths of Mr. and Mrs. Bravence," but that Bryan Lankford himself was possessed of that specific intent, and were not the *Tison* case seemingly standing in the way, I could vote to affirm the death penalty, reserving only the proposition that the Idaho Constitution requires that the sentencing function be performed by a jury.

An unfortunate aspect of this case, as in the murders by Sivak and Bainbridge, and as in the murder by Scroggins and Beam, is the separate trials of the two defendants. They were jointly charged, had a joint preliminary hearing, and as I remember it, were named as co-defendants in the initial information filed in district court. The record does not contain an order of severance or a motion for severance, and there appears to be no involvement of any confessions to murder which would require application of the *Bruton* rule. It would seem to me that here, as in the Sivak-Bainbridge murder, and in the Scroggins-Beam murder, and likewise the Fetterly-Windsor murder, where there were no eye-witnesses other than the defendants, a single jury would not only have been better suited to decipher the truth, but to make the assessment of the "degree of participation in the crime," and impose the penalty – which would likely be highly proportionate.

SUPREME COURT OF THE UNITED STATES

No. 87-6276

Bryan Stuart Lankford,

Petitioner,

v.

Idaho

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Idaho.

ON CONSIDERATION of the motion of petitioner for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered that the motion to proceed *in forma pauperis* and the petition for writ of certiorari are granted.

June 13, 1988

SUPREME COURT OF THE UNITED STATES

No. 87-6276

Bryan Stuart Lankford,

Petitioner,

v.

Idaho

ON WRIT OF CERTIORARI to the Supreme Court of Idaho.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated, and that this cause is remanded to the Supreme Court of Idaho for further consideration in light of *Satterwhite v. Texas*, 486 U.S. ___ (1988).

June 13, 1988

SUPREME COURT OF IDAHO.

STATE of Idaho, Plaintiff-respondent,

v.

Bryan Stuart LANKFORD,
Defendant-appellant.

Nos. 15760, 16170.

April 4, 1989.

BAKES, Justice.

This matter is before us on remand from the Supreme Court of the United States. That Court vacated our decision affirming Bryan Lankford's conviction and death sentence, *State v. Lankford*, 113 Idaho 688, 747 P.2d 710 (1987), and remanded for further consideration in light of its recent decision in *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988). *Lankford v. Idaho*, 486 U.S. ___, 108 S.Ct. 2815, 100 L.Ed.2d 917 (1988). After further consideration we again affirm the judgment of conviction and sentence imposed.

I

Our decision on remand requires us to analyze the United States Supreme Court opinion in *Satterwhite*. The Court began its opinion with the following:

> "In *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), we recognized that defendants formally charged with capital crimes have a Sixth Amendment right to consult with counsel before submitting to psychiatric examinations designed to determine their future dangerousness." 108 S.Ct. at 1794-1795.

The Court in *Satterwhite* further stated:

> "We granted certiorari to decide whether harmless error analysis applies to violations of the Sixth Amendment right set out in *Estelle v. Smith*." 108 S.Ct. at 1796.

The Court in *Satterwhite* held that the harmless error analysis does apply.

In this case Lankford did not raise the issue of a sixth amendment violation either at trial or on appeal. Accordingly, this issue is waived. *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).[1]

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[1] We also note that there is no evidence of any sixth amendment violation in this case. During Lankford's trial he was represented by counsel and voluntarily chose to testify in his own defense. His testimony on direct and cross examination was extensive, describing not only his latest version of the killing of the Bravences, but also describing how he and his co-defendant brother, Mark, left Texas and came to Idaho. Lankford related details of the killings, placing blame primarily on Mark, and also related their theft and use of the Bravences' van and credit cards, which the two brothers used to make their way back to Texas.

After Lankford's conviction, but before sentencing, his counsel approached the prosecutor offering this client's testimony in Mark's upcoming trial, in exchange for immunity from future prosecutions for the charges of robbery and fraudulent use of the credit cards. An immunity agreement was approved and executed by Lankford and his counsel in open court. At every step of his brother's trial Bryan Lankford was represented by counsel. Later, Lankford was subpoenaed as a witness at a hearing on Mark's motion for new trial and was represented by

(Continued on following page)

II

Lankford also argues that his fifth amendment privilege against self incrimination was violated when the trial court referred in sentencing to Lankford's testimony at the hearing for Mark's new trial motion. In its "FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER SECTION 19-2515, IDAHO CODE," the trial court considered the objective of "rehabilitation" and noted:

> "The defendant has shown no remorse for his offenses. He has not cooperated with authorities after his arrest. He has told authorities that he and his brother had nothing whatsoever to do with the death of the Bravences. He has testified that his brother was alone involved in the murders. He has testified (On October 10, 1984, in the companion case, State v. Mark Lankford, Idaho County Case No. 20158) that he called the *Lewiston Tribune* and claimed that it was he alone who murdered the Bravences[.] [T]his he later denied and offered the explanation which is set forth in the addendum to the presentence investigation report under date of October 3, 1984, to the effect that it was simply part of a plan that would secure freedom for his brother who could in turn free him.
>
> "Suffice it to say that defendant has failed to take any responsibility whatsoever for his actions. This court specifically finds that the defendant has no capacity for rehabilitation."

(Continued from previous page)

counsel at every step of that proceeding. Accordingly, there is no evidence in the record that Lankford's sixth amendment right to counsel was violated, unlike the situation in *Satterwhite*.

Assuming that *Satterwhite* applies equally where a fifth amendment violation is shown, as distinguished from a sixth amendment violation, we now analyze the fifth amendment issue since it was adequately raised on direct appeal and therefore was not waived.

As we stated in our original opinion, footnote 7, there is no factual predicate for a fifth amendment violation. Footnote 7 states:

> "7. Lankford asserts that the district court judge used the immunized testimony in its findings of fact to support the imposition of the death penalty. However, the record does not support that assertion. While the district court described Lankford's testimony at his brother's motion for new trial in its sentencing memorandum, it was not considered as an aspect of any of the statutory aggravating circumstances found by the court. During the district court's oral discussion of the sentence, the judge stated:
>
> 'The defendant has shown no remorse for his offenses. He has not cooperated with authorities after his arrest. He has told authorities that he and his brother had nothing whatsoever to do with the death of the Bravences. He has testified that his brother was alone involved in the murders. He has testified on October 10, 1984 in the companion case, State v. Mark Lankford, Idaho County Case No. 20158, that he called the *Lewiston Tribune* and claimed that it was he alone who murdered the Bravences. This he later denied and offered the explanation which is set forth in the addendum to the presentence investigation report under date of October 3, 1984, to the effect that it was simply part of a plan that would secure

> freedom for his brother, who could in turn free him.'
>
> "Although it is true that the district court judge pointed out the conflicting testimony given by Lankford at various times, including the testimony given pursuant to the immunity agreement, there has been no showing that the sentence was based upon the comments quoted above."

After further review of the "FINDINGS OF THE COURT IN CONSIDERING DEATH PENALTY UNDER SECTION 19-2515, IDAHO CODE," we continue to adhere to the view expressed in footnote 7 of our original opinion. Accordingly, we find no factual predicate for Lankford's claim.

III

Even if we assume that the trial court considered Bryan's testimony at Mark's motion for new trial in arriving at Bryan's sentence, this consideration does not constitute a violation of the fifth amendment. Lankford's testimony at his brother's hearing for new trial related a version of facts given twice previously, once voluntarily at his own trial and again at Mark's trial pursuant to the immunity agreement. That testimony, as the trial court noted, was that "his brother was alone involved in the murders." This differed from Lankford's original version, that neither were involved. The whole basis of Mark's motion for new trial was that Bryan Lankford telephoned a local newspaper, the *Lewiston Tribune*, recanted his previous testimony and asserted, as the trial court noted,

"that it was he [Bryan] alone who murdered the Bravences." By the time the motion was heard, Bryan Lankford had recanted the version he gave to the *Lewiston Tribune*, and reasserted the version he gave at his own trial and at his brother's trial.

The trial court's only reference at sentencing to Bryan Lankford's testimony given at the hearing on Mark's motion for a new trial, was to note the recurrent changes in Bryan Lankford's story. The trial court did not believe the substance of Bryan's *Tribune* story – that he alone committed murder. In denying Mark's motion for new trial, the trial court stated:

> "I'm satisfied that the new evidence that does consist of the statement by Bryan Lankford to the effect that he was totally responsible for the death or deaths of the Bravences was false. That particular statement was merely a product of depression, an effort, perhaps to get attention, certainly an effort to get out of trouble or to avoid punishment for what he did, and it is a very real possibility that two involved in a crime such as this, after they are both convicted of first degree murder, could tell then, different stories to help one get a new trial and, then, the other one could help the other get a new trial and certainly eventually hope for the acquittal of both or the acquittal of one."

The only consideration given to Lankford's testimony at Mark's new trial proceeding was that it again supported the trial court's observation that Lankford had not taken responsibility for his actions as evidence by his repeated attempts to upset the course of justice by constantly changing his story, which damaged his credibility in the eyes of the court.

When Bryan Lankford, while represented by counsel, voluntarily took the stand in his own defense, testified at length concerning the entire transaction, and was cross examined, he effectively waived any immunity he had under the fifth amendment with respect to the subject matter of the testimony he gave. *Harrison v. United States*, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968). Having thus waived any privilege against self incrimination, the trial court could consider at sentencing the fact that Lankford was continually giving false testimony under oath, by his ever changing version of the facts. As the trial court noted, Lankford, by continuing to change his story, "failed to take any responsibility whatsoever for his actions." To the trial court, Lankford's continual testifying falsely under oath evidenced a scheming on his part which demonstrated a lack of "capacity for rehabilitation."

Lankford argues that the sentencing was a proceeding entirely separate from his trial and that he can therefore reassert his waived privilege. However, if a defendant has previously waived his privilege against self incrimination by voluntarily testifying at trial, that waiver continues into sentencing with respect to the testimony voluntarily given at trial. *See Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). *See also Harrison v. United States*, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968); *cf. United States v. Houp*, 462 F.2d 1338, 1340 (8th Cir.1972) ("Once the privilege is effectively waived, the information given is admissible at any subsequent trial," *citing Harrison v. United States*, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1981)); *Neely v. State*, 97 Wis.2d 38, 292 N.W.2d 859, 864 (1980) ("[A] defendant

who takes the stand in his own behalf cannot then claim the privilege against cross examination on matters reasonably related to the subject matter of his direct examination," *citing McGautha v. California*, 402 U.S. 183, 215, 91 S.Ct. 1454, 1471, 28 L.Ed.2d 711 (1971)).

Neither Lankford's immunity under the agreement nor his privilege against self incrimination prevent the trial court from considering at sentencing his lack of credibility resulting from his inconsistent and false testimony in the several proceedings prior to sentencing. There is no protected right to commit perjury either under the fifth amendment, *United States v. Wong*, 431 U.S. 174, 97 S.Ct. 1823, 52 L.Ed.2d 231 (1977); *Glickstein v. United States*, 222 U.S. 139, 32 S.Ct. 71, 56 L.Ed. 128 (1911), or pursuant to I.C. § 19-1115.

Accordingly, since the testimony Lankford gave at the hearing on his co-defendant brother's motion for new trial involved the same transaction and the same matters which he voluntarily testified about in his own defense on his own case, there was no fifth amendment immunity available to him with respect to these matters, and there could be no fifth amendment violation. Assuming that the United States Supreme Court's decision in *Satterwhite* applies to fifth amendment as well as sixth amendment claims, it still has no application to this case because there was no fifth amendment violation. Accordingly, we need not reach the *Satterwhite* "harmless error" analysis. We reaffirm our prior decision in this matter.

IV

As an alternative and independent ground for our decision, we hold that even if Lankford had not testified

at his own trial, thereby waiving immunity under the fifth amendment, the immunity agreement which he and his counsel proposed and voluntarily entered into was sufficient to waive his fifth amendment privilege against self incrimination with respect to testimony given at Mark's trial and hearing on motion for new trial.

V

Lankford has again raised other issues of state law previously raised on direct appeal. Our prior opinion, *State v. Lankford*, 113 Idaho 688, 747 P.2d 710 (1987), resolved all those other issues against Lankford and those other issues are the law of the case and final. *Rawson v. United Steelworkers of America*, 115 Idaho 785, 770 P.2d 794 (1988) ("[S]ince the United States Supreme Court has jurisdiction only to require our reconsideration of matters involving federal law, our decisions [on state law issues] remain the law of the case and we decline to reopen them under certiorari procedure.").

We reaffirm our prior decision.

SHEPARD, C.J., and HUNTLEY, J., concur.

JOHNSON, Justice, concurring and dissenting.

I concur in part V, but dissent from parts II, III and IV of the majority opinion. In my view, Lankford's fifth amendment rights were violated by the trial court's reliance at sentencing on Lankford's testimony at the trial of Lankford's brother and at the hearing on his brother's motion for a new trial. The testimony at the brother's trial was given by Lankford after an immunity agreement had been approved by the trial court. The testimony at the

hearing on the brother's motion for a new trial was given by Lankford after the trial court had accepted an agreement by defense counsel and the prosecutor that Lankford's testimony would be used only for the purposes of his brother's motion for new trial. I would hold that under *Satterwhite v. Texas*, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988) this violation was not harmless error.

LANKFORD'S IMMUNIZED TESTIMONY AND ITS USE IN SENTENCING.

Lankford and the prosecuting attorney entered into an immunity agreement concerning his testimony at his brother's trial. The agreement recited that Lankford would refuse to answer questions if he were called to testify, on the ground that he might incriminate himself. The agreement granted Lankford immunity "from prosecution and penalty co-extensive with Idaho Code § 19-1114." The trial court found that there was "good cause" for the agreement and approved it. At his brother's trial Lankford testified that his brother killed the Bravences.

After his brother was convicted, Lankford was called to testify at a hearing on his brother's motion for a new trial. His attorney told the trial court in that hearing that on the basis of the fifth amendment she had advised Lankford not to testify. She said that she did not want him testifying on matters to which he had testified previously, because she did not believe that his testimony at his brother's trial was voluntary, but was coerced. After extended discussion between the trial court and counsel, the trial court accepted the agreement of the prosecuting

attorney and Lankford's attorney that Lankford's testimony at the hearing would be used for purposes of his brother's motion for new trial and for no other purpose. Lankford then testified about a conversation he had with a newspaper reporter from the Lewiston Tribune. He told the reporter that he alone killed the Bravences. He testified at the hearing on his brother's motion for a new trial that this was a lie and that he had told the reporter he committed the murders because his brother told him to do it.

In sentencing Lankford to death the trial court considered both his testimony at his brother's trial and his testimony at the hearing on his brother's motion for a new trial. Under the title "Reasons Why Death Penalty Was Imposed" in the trial court's findings considering the death penalty, the trial court referred to this testimony and concluded by stating:

> Suffice it to say that the defendant has failed to take any responsibility whatsoever for his actions. This court specifically finds that the defendant has no capacity for rehabilitation.

Fifteen lines later the trial court imposed the death penalty.

LANKFORD'S FIFTH AMENDMENT RIGHTS WERE VIOLATED.

It is clear that Lankford would not have testified at his brother's trial, or at the hearing on his brother's motion for a new hearing, unless his testimony had been immunized. The use of his testimony by the trial court in sentencing was a violation of his rights under the fifth

amendment *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972).

In *Kastigar* the Supreme Court said:

> Immunity from the use of compelled testimony . . . prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness.

Id. at 453, 92 S.Ct. at 1661.

In my view, this prohibition was violated when the trial court used Lankford's testimony in fashioning his sentence.

THE VIOLATION WAS NOT HARMLESS ERROR.

In its original opinion in this case (*State v. Lankford*, 113 Idaho 688, 747 P.2d 710 (1987)) this Court quoted the portion of the findings of the trial court concerning Lankford's testimony at his brother's trial and at the hearing on his brother's motion for new trial and stated:

> Although it is true that the district court judge pointed out the conflicting testimony given by Lankford at various times, including the testimony given pursuant to the immunity agreement, there has been no showing that the sentence was based upon the comments quoted above.

Id. at 696, 747 P.2d at 718, n. 7.

In my opinion, it is this comment that caused the United States Supreme Court to vacate the judgment and to

remand this case to us for further consideration in light of *Satterwhite v. Texas*.

> In *Satterwhite* the Supreme Court held: It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer.
>
> . . . .
>
> The question . . . is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Citing Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).)

486 U.S. at ___, 108 S.Ct. at 1798, 100 L.Ed.2d at 290.

I am unable to say, beyond a reasonable doubt, that Lankford would have been sentenced to death, if his immunized testimony had not been used.

I would reverse and remand for resentencing and direct the trial court not to consider the immunized statements of Lankford.

BISTLINE, J., concurs.

SUPREME COURT OF THE UNITED STATES

No. 88-7247

Bryan Stuart Lankford,

Petitioner

v.

Idaho

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Idaho.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question II presented by the petition.

October 15, 1990

No. 88-7247

In The

Supreme Court of the United States

October Term, 1990

BRYAN STUART LANKFORD,

Petitioner,

v.

IDAHO,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Idaho

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a death sentence violates the Sixth, Eighth and Fourteenth Amendments, when it is imposed by a trial judge after the prosecutor has notified the defendant in writing, pursuant to court order, that the state would not seek the death penalty, and defense counsel, relying on the written notice, has made no argument and presented no evidence relating to the statutory aggravating factors or the appropriateness of imposing the death penalty.

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OPINIONS BELOW

The original opinion of the Idaho Supreme Court affirming Petitioner's death sentence was reported at 113 Idaho 688, 747 P.2d 710 (1987) and is reproduced at JA 204. This Court granted a Petition for Writ of Certiorari in *Lankford v. Idaho*, 486 U.S. 1051 (1988) and vacated the judgment and remanded to the Idaho Supreme Court for reconsideration in light of *Satterwhite v. Texas*, 486 U.S. 249 (1988).

The Idaho Supreme Court's opinion on remand, reaffirming its prior decision, is reported at 116 Idaho 279, 775 P.2d 593 (1989), and is reproduced at JA 276.

JURISDICTION

The opinion of Idaho Supreme Court on remand from this Court was issued on April 4, 1989. JA 276. This Petition was filed on May 19, 1989. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257(a), Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . . and to have the assistance of counsel for his defense.

This case also involves the Eighth Amendment to the Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves the Fourteenth Amendment to the Constitution, which provides in pertinent part:

> No State shall . . . deprive any person of life- . . . without due process of law. . . .

This case also involves a number of provisions of the laws and court rules of the State of Idaho which are lengthy and are therefore included in an Appendix to this Brief.

STATEMENT OF THE CASE

This case involves a death sentence imposed upon Petitioner Bryan Stuart Lankford by Judge George Reinhardt, III, of the Second Judicial District Court, in Idaho County, Idaho, upon a conviction of two counts of first degree felony murder.

A. The Conviction.

Petitioner's murder convictions resulted from his role in the robbery of a married couple, Robert and Cheryl Bravence, at a campground near Grangeville, Idaho, during which the Bravences were killed by Petitioner's older brother, Mark Lankford. In its opinion on direct appeal, the Idaho Supreme Court summarized the facts of the crime thus:

> The brothers came upon the Bravences' campsite and decided to take the Bravences' van. Bryan Lankford walked into the camp armed with a shotgun and engaged the Bravences in conversation. Subsequently, Mrs. Bravence left the group and went to a nearby creek. At this point, Mark Lankford ran into the campsite and ordered Robert Bravence to kneel down on the ground. While kneeling, Mark then hit Robert Bravence over the head with a nightstick. Cheryl Bravence then came up from the creek, and Mark told her to kneel down on the ground and then hit her over the head with the same nightstick. The Bravences were beaten with such force that their skulls had to be reconstructed by an anthropologist before the cause of death could be scientifically determined.
>
> The brothers loaded the bodies into the van and headed back into the forest. The bodies were removed from the van and concealed under branches and other debris a short distance from where the Lankfords had abandoned their car. Lankford and his brother then took the van and traveled through Oregon and California before abandoning it in Los Angeles. During their flight from the murder scene they purchased accommodations and food with the Bravences' credit card.
>
> * * *
>
> Lankford's defense theory was that he was only an accessory after the fact. Lankford testified in his own behalf and stated that he was dominated by his older brother who was a violent and dangerous person. He testified that he thought his brother would merely knock out the Bravences, and he had not pointed the shotgun at them upon entering the camp. He also testified that after the murders he was hysterical and remained in the van while his brother hid the

> bodies[1] in the woods. The jury nevertheless found Lankford guilty of two counts of first degree murder.

JA 205-207.

Petitioner's conviction of first degree murder followed inevitably from his testimony and the court's instructions to the jury. Consistent with Idaho's first degree felony murder statute, those instructions said it was

> not necessary that the State prove that this defendant actually committed the act which caused the death of the victims, provided the State prove beyond a reasonable doubt that the defendant was present, and that he aided and abetted in the commission of the crime of robbery as alleged. . . .

JA 16. The jury was also instructed:

> If a human being is killed by any one of several persons engaged in the perpetration of the crime of robbery, all persons who either . . . commit the act constituting robbery or . . . aid and abet in its commission, are guilty of murder of the first degree, whether the killing is intentional or unintentional.

JA 17.[2] Pursuant to these instructions, the jury returned a verdict of guilty on both counts of first degree felony murder. R. Trial Vol. II, pp. 244, 250.

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[1] Petitioner's testimony was that he thought the Bravences were alive, but unconscious, at the time Mark carried them into the woods. T. Trial IV 708.

[2] A jury instruction requiring a finding of a specific intent to kill was offered but refused. R. Trial Vol. II, p. 242.

B. The Sentencing.

Petitioner's sentencing was delayed, at the prosecutor's request, until after the separate trial of his brother Mark. Petitioner was called and testified as the state's primary witness at Mark's trial.[3] Pursuant to Idaho law, the sentencing was before the trial judge alone.[4]

At sentencing, Petitioner was represented by a new court appointed lawyer, who was appointed on September 20, 1984 – one week after the the prosecutor filed a formal notice that it "was not" seeking the death penalty in Petitioner's case, JA 26 (original emphasis), and three weeks before Judge Reinhardt imposed a death sentence on Petitioner despite that notice. The sequence of events during this four week period are central to the issue presented here.

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[3] *See State v. Mark Lankford*, 116 Idaho 860, 781 P.2d 197 (1989). Petitioner testified at Mark Lankford's trial under an immunity agreement, approved by Judge Reinhardt, which provided that he would be granted immunity from prosecution and penalty co-extensive with Idaho Code § 19-1114. JA 216. Idaho Code § 19-1114 provides that a person who testifies under such a court approved agreement "shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which, in accordance with such agreement, he answered or produced evidence. . . . "

[4] In Idaho, sentencing in both capital and non-capital cases is done by the trial judge alone. Idaho Code § 19-2515. Judge Reinhardt was the trial judge who sentenced both Petitioner and his brother Mark Lankford, to death.

1. The Notice that the Death Penalty Would Not be Sought.

After Petitioner testified in Mark Lankford's trial, Judge Reinhardt granted a defense motion to require the prosecution to notify defense counsel and the court, in writing, whether it would be seeking the death penalty. JA 20, 22. The order on this motion provided:

* * *

> That on or before June 18, 1984, the State shall notify the Court and the Defendant in writing as to whether or not the State will be seeking and recommending that the death penalty be imposed herein. Such notification shall be filed in the same manner as if it were a formal pleading;
>
> That in the event the State shall seek and recommend to the Court that the death penalty be imposed herein . . .
>
> > (a) The State shall formally file with the Court and serve upon counsel for the Defendant a statement listing the aggravating circumstances enumerated in Idaho Code Section 19-2515(f) that it intends to rely upon and prove at the sentencing hearing to justify the imposition of the death penalty;
> >
> > (b) The Defendant shall specify in a concise manner all mitigating factors which he intends to rely upon at the time of the sentencing hearing.

JA 22-23.

When the sentencing was continued past the original June date, a new sentencing date of October 12, 1984 was set and the notification order was re-issued on September

6, 1984. JA 24-25. On September 13, 1983, the prosecution filed a written response to that order, which stated:

> In relation to the above named Defendant, Bryan Stuart Lankford, the State through the prosecuting attorney, *will not* be recommending the death penalty as to either count of first degree murder for which the defendant was earlier convicted.

JA 26 (emphasis in original).

2. The Appointment of New Counsel for Sentencing.

On September 20, 1984, a hearing was held regarding Petitioner's *pro se* request that a new lawyer be appointed to represent him at sentencing. JA 27-28. That hearing marked the first entry into the case of Petitioner's present counsel of record, Joan Fisher. Ms. Fisher was present in the courtroom during the colloquy between Petitioner, the trial court, and counsel, regarding the request for new counsel. JA 29-32. During that colloquy, there was no suggestion, by the court or any participant, that a death sentence could be imposed upon Petitioner despite the prosecutor's notice that the death penalty would not be sought.

Ms. Fisher previously had contact with Petitioner as an Assistant District Attorney in Harris County Texas, where she prosecuted him for a robbery. Trial R. Vol. II, pp. 352-353. On the same day she was appointed, Ms. Fisher advised Petitioner in writing of this fact and the "appearance of a conflict of interest" it created. *Id.* at 354. Petitioner waived the conflict, in a document filed the same date. *Ibid.*

3. Petitioner's Motions Before Sentencing.

In early October, 1984, new counsel filed several motions on Petitioner's behalf: a Motion to Dismiss Trial Counsel, a Motion for a Typewritten Transcript of the Trial, a Motion for a Continuance, and a Motion for a New Trial. JA 35, 38, 46, 47. All those Motions were heard by Judge Reinhardt on October 10, 1984, two days before the scheduled sentencing hearing. JA 47.

The Motion to Dismiss trial counsel Wilfred Longeteig was necessitated by the Motion for a New Trial, which alleged that Mr. Longeteig had rendered ineffective assistance at the trial and pretrial proceedings. JA 51. Mr. Longeteig was discharged; but the court stated that he would "not dismiss Mr. Longeteig as far as an obligation that he has now to stand in the wing, so to speak, to be available to Ms. Fisher and [the defendant]. . . . " JA 53-54.[5]

In support of the Motion for a Typewritten Transcript, Ms. Fisher pointed out to the court: "I was not here during the trial. I've heard no testimony on what has gone before, so what I know is basically what I've read in the Lewiston *Tribune*." JA 54. "I don't know what happened at trial. . . . I have attempted to talk to Mr. Longeteig, but . . . got no response." JA 55. Judge Reinhardt denied this Motion, ruling that – from the

[5] Mr. Longeteig was present at the subsequent hearings. JA 95 However, the record indicates he was not otherwise "available" to new counsel, before or after that date. JA 55; R. Trial Vol. II, p. 428-9.

Preliminary Hearing transcript,[6] trial tapes, and the ability to consult with Mr. Longeteig – counsel had "all the information available to you that you need to adequately prepare for sentencing." JA 60.

The Motion for Continuance sought more time to prepare, both for the Motion for New Trial, and the sentencing hearing. JA 35, 38, 61. In support of the request for a continuance, Ms. Fisher represented to the court:

[6] In connection with its ruling that the Preliminary Hearing transcript would adequately apprise new counsel of the trial testimony, the court asked Mr. Longeteig: "if one wanted to review a transcript of the trial, could one receive the same benefits by reviewing the Preliminary Hearing transcript?" Mr. Longeteig responded "I don't know if – I've heard both. It's probably easier for me to say 'Yes,' but I – I don't know for sure." JA 57. When pressed by the court to agree that "the information contained at the Preliminary Hearing, in essence, is the same as the information that was brought forth at trial," Mr. Longeteig said, "Well, I don't know of any material differences, no." JA 58.

In fact, there were a number of important differences between the preliminary hearing and the trial. Six witnesses testified at trial who did not testify at the preliminary hearing at all. These included three F.B.I. forensic experts who presented key scientific circumstantial evidence. *See* Tr. Trial at 474-502, 553-561. Other witnesses added significant new facts which were not in their earlier testimony. For example, a state forensic expert, Robert Cihak, reported new findings in his trial testimony which bore on the sequence of events during the crime. *See* Tr. Trial 420. Roy Ralmuto, a friend of Petitioner's, described events after the crime that were not mentioned in his earlier testimony. Tr. Trial 593, 608-09, 614. In addition, Mr. Ralmuto and three police officers testified at trial about statements and admissions allegedly made by the Petitioner, which were not in evidence at the preliminary hearing. See Tr. Trial at 513, 601, 610, 650, 828-29.

> It's my opinion that I cannot adequately or effectively represent my client without time to review the transcripts, to review the tapes, to talk with Mr. Longeteig, to ascertain whether or not there are additional witnesses, and, in fact, I believe that there are additional witnesses that I have not yet been able to put in a position where I can bring them up for either the Motion for a New Trial or the Motion for Continuance.

JA 62. She went on to inform the court of one witness – Gretchen Maurer, the mother of Petitioner and Mark Lankford – whom she had contacted but who could not come to court in time for the New Trial Motion or sentencing because of health reasons. JA 62-64. She said Mrs. Maurer would testify

> that she knows Bryan and Mark because she is mother to both of them, that she has known them since they were born, that she knows their relationship, that their relationship is such that Mark is violent, Mark is mean, Mark is a threat to society, Mark has threatened to kill her on occasion, Mark has threatened her sons on occasion, that she is afraid of Mark, that everyone in her family is afraid of Mark, that Bryan is afraid of Mark, was afraid of Mark, and has continued to be afraid of Mark, due to the type of relationship that existed in that family. Her testimony as to my client would be that Mr. Lankford was a peaceful person, . . . that the only time she knew of him being in trouble was when Mark was influencing him, that Mark had the capability to influence him and to influence other members of the family, that Bryan is not a threat to society, that Bryan is not a dangerous person, that Bryan has never acted violently in all the time that she has known him, that Bryan has, in fact, been very supportive of her and has been what every mother wants for a son. Those were not

> her exact words. Consequently, you know, her testimony is relevant and material to the sentencing, obviously. Secondly, she would testify that she had never been contacted by Mr. Longeteig and that I believe that her testimony, given the relationship of Mark and Bryan, would be supportive of Mr. Bryan Lankford's testimony at trial. She would have been a material and relevant witness that should have been called to trial, and, consequently, the fact that Mr. Longeteig never contacted her to even discover whether or not she was an important witness would be supportive of my Motion for New Trial on the basis of ineffective assistance of counsel.

JA 63-64. The state opposed the motion, saying that the testimony of Ms. Maurer and other witnesses to the same effect would be "cumulative, and other people can testify as to the same things." JA 65. Ms. Fisher responded that of "[t]he witnesses that I have thus far discovered- . . . none of these witnesses had ever been contacted before. . . . " JA 69.[7] The court nonetheless denied the continuance, saying "a granting of your Motion for a New Trial or a continuance of your Motion for a New Trial would, obviously, continue the sentencing, and I'm not prepared to do that, and as a consequence, I'll have you proceed on your Motion for a New Trial at this time." JA 71.

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[7] When the court pointed out that "the matter can be raised post-sentencing or by way of appeal by way of Post-Conviction Plea," Ms. Fisher said, "I don't want to be in a position of saying that counsel was ineffective when I was counsel for two months. . . . " JA 70.

In support of the Motion for a New Trial, the defense called several witnesses who knew both Petitioner and Mark Lankford. Each one of them testified that Mark Lankford was a violent person who held a substantial dominating influence over his younger brother. Tr. 10/10/84 at 123-155. Defense counsel also called Mr. Longeteig, who said that he never contacted any of these witnesses because "I felt I had adequate information without talking to all those people." JA 72. Mr. Longeteig acknowledged that he knew before trial that his client "faced a possible death penalty" (JA 73), but he said:

> A So I told him from the start I didn't see a very realistic possibility of a death penalty, but we were very concerned with a fixed life term[8] as opposed to something else."
>
> Q So it's your testimony that you told Mr. Lankford that he wouldn't get the death penalty?
>
> A Yes.
>
> Q Even if he didn't testify?
>
> A Right.

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[8] Under Idaho Code § 18-4004, a sentence of life imprisonment for murder must include "a minimum period of confinement of not less than ten (10) years which . . . the offender shall not be eligible for parole or discharge. . . . " I.C. § 4004. The minimum term may be set at the offender's natural life, making the sentence effectively life in prison without the possibility of parole. *See State v. Eubank*, 114 Idaho 635, 759 P.2d 926, 928 (Ct. App. 1988). In the latter event, the result is commonly referred to as a "fixed life" sentence. Any minimum term of less than life is referred to as an "indeterminate life" sentence. *See also* Idaho Code §§ 19-2113A, 19-2114.

JA 78. Mr. Longeteig also testified that, at Petitioner's trial, he thought "it probably was important . . . that he testified in his own behalf because I wanted to establish a record in his own trial that . . . there was not sufficient evidence to show that he was a triggerman so to speak . . . I think once Bryan's trial was over, . . . we basically had won that point." JA 79.[9]

Bryan Lankford gave similar testimony, regarding the advice Mr. Longeteig gave him about the possible sentences he faced, depending on whether he testified for the State at the trial of his brother, Mark:

> I read into it: if I went ahead and testified, I'd get indeterminate life. If I didn't, I'd probably get fixed life. I believe that's the same way he felt, also.

JA 85. The motion for a new trial was denied. JA 49. The hearing closed at 10:22 p.m., on October 10, with the court reiterating its denial of the motion to continue the sentencing date of October 12. JA 87-88.

During the entire hearing on all these defense motions, neither the court nor counsel for either side indicated at any point that the death penalty remained at issue in the case.

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[9] Mr. Longeteig also testified about the fact that there were plea bargaining discussions which concluded with an agreement between the defense and prosecution that Petitioner would receive an indeterminate sentence with a ten year minimum, upon a guilty plea. JA 79-80; *see* JA 86. The agreement, however, was contingent on a commitment from Judge Reinhardt, who declined to commit himself to a ten year minimum; so the case went on to trial. *Ibid*.

4. Mark Lankford's Motion for a New Trial.

The next day, October 11, Judge Reinhardt heard a motion for a new trial in Mark Lankford's case. Petitioner was subpoenaed by Mark's counsel to testify on that motion, about a statement he made to the Lewiston *Tribune* in June, 1984, recanting his testimony against Mark. JA 89. Petitioner appeared with counsel, who objected to the questioning on grounds of self-incrimination. JA 89-90. Her objection initiated a colloquy, and a recess, after which the parties placed on the record an agreement that Petitioner would be immune from any prosecution arising out of his testimony at that hearing, and that "this testimony would be used for purposes of Mark Lankford's Motion for a new trial and for no other purpose." JA 93. Judge Reinhardt accepted this agreement, and Petitioner then testified – admitting that he made the recantation statement to the newspaper,[10] but reiterating that his trial testimony and his testimony against Mark were the truth. *See* JA 286. Mark Lankford's motion for a new trial was denied.

Again, during the course of this hearing, neither the court nor counsel suggested at any time that Petitioner still faced a possible death sentence.

5. Petitioner's Sentencing Hearing.

Petitioner's sentencing hearing was held the next day, October 12, 1984. At the outset of the hearing, Ms.

[10] Petitioner said that pending sentencing, he had become depressed and was persuaded by his brother Mark Lankford to call a local newspaper and admit to having committed the killings himself when Mark Lankford was not present. *See* JA 281.

Fisher re-urged her motion for continuance, noting that she had no transcript, had been unable to listen to the tape of the trial, and was in "a position of going forward on sentencing without knowing exactly what the Court is considering during the sentencing." JA 99. The motion was denied; the court said "a continuance will not provide you with any significant or additional information that you may need for sentencing."[11] JA 100. No suggestion was made by the court or counsel that Petitioner might be facing a capital sentence.

The defense then called the same lay witnesses who had been called on the new trial motion, who testified to essentially the same facts: Bryan Lankford's non-violent nature, Mark Lankford's violent and dangerous propensities, Mark's dominance of Bryan, and Bryan's fear of Mark. JA 95-97. The defense also called Dr. Michael Estess – a psychiatrist with the State Department of Corrections who had examined Petitioner at the court's request – to testify regarding Bryan's fear of and dominance by his brother. JA 97.

The prosecution presented no evidence at the sentencing, but simply argued in favor of its recommendation of an indeterminate life term. JA 101-103. Regarding the facts of the crime, the prosecutor argued the trial testimony showed:

[11] In denying this Motion, Judge Reinhardt said for the first time that the appointment of co-counsel for sentencing had been the result of "an effort to delay these proceedings" by Petitioner. JA 100. Previously, in granting the motion for new counsel, the judge had specifically abjured any such finding. JA 31.

> I think, what the original intention was was to steal a car to get out of Idaho. It obviously got grossly out of hand. The testimony indicates that Bryan and Mark had a discussion, which other witnesses corroborate . . . and that discussion ultimately led to the taking of the Bravences van. Those things, all taken together, in my view and, apparently, in the jury's view, ultimately resulted in a death occurring as part of a robbery and makes Bryan guilty of murder in the first degree. If it were not for the Felony Murder Rule, there would be a difficulty in the proof in this case and in the conviction of Bryan Lankford, but it was, and that was the law. Bryan does stand, then, convicted of two counts of first degree murder for his participation.

JA 101-102. Regarding the issue of Bryan's dominance by his brother, Mark, the prosecutor said:

> I tend to generally believe the witnesses from Texas, the family members, and I have believed this for a long time: that Bryan has traditionally been a pretty good person, except when he's been around Mark.

JA 102. Regarding the appropriate punishment to be imposed, the prosecutor argued:

> Those are the reasons . . . what his family says about him as to why he would not and I would not and did not earlier recommend the death penalty, as the court required, to be filed in a document. The question now becomes: What are the options left and what is the appropriate thing for the Prosecution to urge to recommend? . . . Seems that the answer lies, again, with Dr. Estes' testimony. That is, in the midpoint of life, age 35 upward, . . . people in general . . . change attitudes and mature, and Dr. Estes' testimony further indicates that there's some rehabilitative potential in Bryan. I

> think, and . . . not knowing what Bryan Lankford would be like in ten years, that that is best – best left with the parole board, and the result in that instance would be an indeterminate life sentence. I think that would be, then, my recommendation to the Court. . . .

JA 102-103. The prosecutor's argument closed with the following colloquy with the court:

> The bottom line is what the family says about him, tempered by what the Doctor predicts, and I think the indeterminate life sentence could do that, giving to the parole board the discretion to keep him longer or to put him back in society at the time he reaches that midpoint in life. That would be my recommendation, your Honor.
>
> THE COURT: I don't understand your recommendation. Are you recommending concurrent indeterminate lifes or consecutive indeterminate lifes?
>
> MR. ALBERS: I'm recommending an indeterminate life sentence.
>
> THE COURT: Concurrent? One's a minimum of ten years, and the other's a minimum of twenty years.
>
> MR. ALBERS: If, in fact, they would be coupled in that fashion. I don't know whether they can be, your Honor.
>
> THE COURT: Well, there's either – if they run consecutively, it's a minimum of twenty years.
>
> MR. ALBERS: If the parole board would do that.
>
> THE COURT: If they run concurrently, it's a minimum of ten years. What are you recommending? A minimum of ten years or a minimum of 20 years?

> MR. ALBERS: I am torn, your Honor. I'm leaving that before the Court. I think there needs to be, though, the indeterminate discretion of the parole board of what the appropriate thing is in view of the heinousness of this crime. I'm not sure. I would leave that with the Court. Leave it in the Court.
>
> THE COURT: So you're recommending somewhere between ten and 20 years?
>
> MR. ALBERS: Basically, yes.
>
> THE COURT: Thank you.

JA 103-104. At no point in his argument did the prosecutor suggest that the court might still impose a death sentence, discuss whether such a sentence was appropriate (except in the reference to his decision not to seek one), or address the applicability of any statutory aggravating circumstances to Petitioner's case; and at no point during the prosecutor's argument did the court reveal it was considering those matters. *See* JA 101-104.

Defense counsel began her argument by advising the court that it was difficult for her "to stand up and present an argument on behalf of Bryan Lankford, due to the lateness in which I was involved in this case. Obviously, I don't have the advantage of knowing what the Court is considering all along." JA 104-105. She went on to introduce her argument, by saying this:

> I'm presently in a position to argue on behalf of Mr. Lankford as to whether he should receive an indeterminate life sentence or a fixed life sentence, and it's not an easy thing to do. . . . I'm in a difficult position because Mr. Albers stands up and he recommends an indeterminate life sentence, which is the least option the Court has available, and obviously . . . I don't want to waste the Court's time, but I think that it's . . . important because I don't know where the Court is. You know, I've had an indication from the testimony that the Court rejected making an opinion prior to trial on – on that particular option. So I'm in a position where I have to argue for Mr. Lankford without having been here in trial, without having, in my opinion, a defense and having been convicted of first degree murder, and I don't think there's any question now with the Prosecutor's recommendation, that an indeterminate life sentence is the appropriate sentence to be given to Mr. Lankford.

JA 105-106. Counsel went on to discuss "the community atmosphere toward the Lankfords," and the negative aspects of Dr. Estess' testimony. JA 106. The latter argument focused on the possibility of rehabilitation and "of Bryan Lankford ever being back in society." JA 109, 114. Counsel posited "the only question before this Court" as whether "the Court [should] give Bryan something to live for?" JA 112.

> [i]t's just a question of whether you give him any hope to, one day, not be a victim, any hope to, one day, be able to stand on his own and be able to repay the people that came up here, be able to show them that their love for him isn't lost, isn't wasted, and I don't think that the Court believes Bryan Lankford deserves a fixed life sentence, and I don't think the Court believes that Bryan Lankford needs a minimum of 20 years. I hope the Court doesn't think that because I think that Bryan Lankford doesn't have the coping mechanism to look at a sentence that says, "You'll be an old man before you ever walk the streets again." I'm asking the Court to give Bryan a chance.

JA 113.

She completed her argument by saying:

> I don't think rehabilitation is a possibility if you take away his hope. We'll ask the Court to give Bryan Lankford the minimum sentence available, which is . . . two indeterminate life sentences to run concurrently.

JA 114. Like the prosecutor, defense counsel did not address at any point in her argument the appropriateness of a death sentence or the existence of any statutory aggravating circumstances or factors which would mitigate against death. JA 104-114.

Judge Reinhardt asked no questions during the course of the defense presentation. At the close of defense counsel's argument, however, he said this:

> Thank you, counsel. Well, the options available to this Court are an indeterminate life sentence or a fixed life sentence for a period of time greater than the number of years he would serve on an indeterminate life sentence, i.e., ten. For example, a fixed term of 40 years or death or a fixed life sentence. So there are a great number of possibilities available to this Court with reference to sentencing in this case. The State and the defense have both suggested and requested that this Court impose an indeterminate life sentence or two indeterminate life sentences. The State has suggested that the Court consider letting those sentences run concurrently or together at the same time. I think one first must analyze what that would mean in this case. That sentence would result in Bryan Lankford being eligible for parole in less than ten years, considering the fact that he's served a considerable amount of time in the County Jail. In view of the recommendation or suggestion that I run

> the two sentences concurrently, the recommendation would be, in essence, that this Court sentence Bryan Lankford to spend, from this day, less than five years in the penitentiary for the murder of each one of the two Bravences, whose names have not yet been spoken today.

JA 114-115. Judge Reinhardt then made a lengthy statement which referred to Petitioner's since-retracted recantation to the Lewiston *Tribune* and Mark Lankford's accusation of him,[12] a report that Petitioner had been in an altercation at the jail,[13] Dr. Estess' testimony, and Petitioner's criminal record. JA 93. On the last issue, the Judge's comments resulted in the following colloquy with counsel (who had prosecuted Petitioner on the Texas charges):

> [THE COURT:] Bryan has been convicted of robbery.

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[12] There was no evidence regarding the substance of Petitioner's statement to the Lewiston *Tribune*, or Mark Lankford's self-serving version of the events, in the record of Petitioner's case at this point. Petitioner's admission that he made the statement to the newspaper was given under assurances from the court it would be used only for purposes of Mark Lankford's new trial motion. JA 93-94. Mark Lankford never testified at either trial; he accused Petitioner of killing the Bravences in a statement for the Presentence Report in his case – which the trial court made part of the record in Petitioner's case on October 15, 1984. JA 97. The Presentence Report in Petitioner's case has Mark repeating Bryan's version of the events, verbatim. JA 125-126.

[13] The report was contained in a Supplement to the Presentence Report, which Petitioner's counsel received on October 10, 1984. JA 148-153. That Report indicated that Petitioner had been involved in a political argument with another inmate, who struck Petitioner in the face. *Ibid.*

MS. FISHER: I don't mean to argue with the Court, your Honor, but a probation in Texas is not considered a conviction.

THE COURT: He was charged with the crime of robbery, placed on probation, and in that particular offense, according to the Presentence Investigation, when he stole – or went into the Safeway, he had upon his person a gun or something that looked like a gun, and to the clerk, I'm sure it mattered not. It was a threat to that clerk of Safeway's, to that clerk's life. It is not as if we are dealing with a totally innocent and clean individual. Now, whether or not he had a gun or something else is something that we will never know because he would have to tell us, and he is a liar, and he is an admitted liar. He's a deceitful individual.

MS. FISHER: Your Honor, I think it's fair to say that the State of Texas couldn't prove that he had a gun.

THE COURT: Counsel, I'm not here to argue with you. Bryan has a violent background, and he's a violent individual.

JA 115-116. Judge Reinhardt then went on to say:

> Now, I think this sentence that has been recommended to me would be contrary to the best interest of society. It would certainly depreciate the seriousness of the crimes that Bryan Lankford has been convicted of, and, in my opinion, seriously undermine the faith that society has in the judicial process. Now, if proper sanctions are not imposed for crime – criminal conduct, crime will, obviously, increase, and society will be put in jeopardy, and they'll be at the mercy of violent individuals such as Bryan Lankford. If I don't impose appropriate sanctions for a crime, eventually the people will by themselves or law enforcement officers will by themselves and,

> then, society, as we know it today, will not continue.

JA 116-117. The judge concluded the hearing with the following comments:

> Now, because I'm not prepared to go along with the recommendation that he receive the minimum, I can't just impose the judgment that I feel is appropriate, obviously, without setting forth specific writting [sic] findings, as required by law, statutory as well as common. And in view of the fact that much of what – or at least some of what I will use to base my decision on is based upon arguments of counsel today and testimony received in this courtroom today, and in view of the lateness of the hour, I am not in a position to render judgment, and as a consequence, the final decision in this case will be prepared after I prepare the requisite findings required of me by law. This matter will be thus taken under consideration. I'll announce my decision on Monday, October 15th, 1984. Mr. Bryan Lankford will be brought into court on that day, and my judgment will be announced.
>
> Is there anything further from the State?
>
> MR. ALBERS: No, your Honor.
>
> THE COURT: From the defense?
>
> MS. FISHER: Your Honor, the only objection I have is that if we can't get the sentencing today – I couldn't get a continuance. I mean I made a Motion for Continuance. I've got my client prepared to be sentenced today. You know, it seems like the Court is playing with him.
>
> THE COURT: Counsel, nobody's playing with anybody here. Nobody's playing with anybody, counsel. I can guarantee you that. The law

requires that I do certain things. The law requires that I do it right. I'm attempting to do so. I need to make those findings, and that will be done on Monday.

MS. FISHER: Can I ask your Honor if you're going to take into consideration the testimony heard at Mark Lankford's sentencing?[14]

THE COURT: With reference to Bryan Lankford's sentencing?

MS. FISHER: Yes.

THE COURT: Absolutely not. The evidence is closed in this case.

MS. FISHER: Will Bryan Lankford be sentenced prior to Mark Lankford's sentencing?

THE COURT: Will Bryan Lankford be sentenced prior to the time Mark Lankford is sentenced?

MS. FISHER: Prior to his Hearing, your Honor.

THE COURT: I do not know. We shall be in recess.

JA 117-119.

The sentencing hearing resumed at 9:38 P.M. on Monday, October 15, 1984.[15] At the outset of that hearing, defense counsel and the prosecutor acknowledged receipt of the Presentence Reports prepared in reference to both

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[14] Mark Lankford's sentencing was scheduled for the same Monday, October 15, 1984. JA 96.

[15] This nighttime proceeding followed the sentencing hearing in Mark Lankford's case, which lasted all day that day.

Petitioner and Mark Lankford. JA 97.[16] When asked whether there was any legal cause judgment should not be pronounced, the defense offered the grant of immunity that was given in conjunction with Petitioner's testimony at Mark Lankford's trial (*see* Note 3, above); the court rejected the argument. JA 98. Petitioner was then asked if he wished to make any statement in reference to sentencing; he said he did not. JA 98. Again, during this colloquy nothing was said by any party or the court indicating that a death sentence was impending.

Judge Reinhardt then began to read from a document entitled Findings of the Court in Considering Death Penalty. JA 98. In those Findings, he found five statutory aggravating circumstances defined by Idaho Code § 19-2515(f) were present in Petitioner's case – every one of which involved the circumstances of the offense and the trial testimony which defense counsel had not seen or reviewed.[17] The Findings also elaborated on the court's

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[16] The Presentence Report in Petitioner's case contained no reference to the possibility of a death sentence, or the existence or nonexistence of any statutory aggravating circumstances. JA 120-153.

[17] The statutory aggravating circumstances identified were:

> (a) At the time the murder was committed, the defendant also committed another murder . . . ;
>
> (b) The murders . . . were especially heinous, atrocious or cruel, and manifested exceptional depravity . . . ;
>
> (c) By the murder, or circumstances surrounding its commission, the defendant exhibited an utter disregard for human life . . . ;

(Continued on following page)

interpretation of the evidence of the crime, and Petitioner's involvement in it, in a section entitled "Reasons Why Death Penalty Was Imposed." JA 158-160.[18] They went on to give a variety of other reasons for the decision which were not the subject of testimony or argument at

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(Continued from previous page)

> (d) The murders were defined as murder of the first degree by Idaho Code Section 18-4003(d) and the murders were accompanied with the specific intent to cause the deaths . . . ;
>
> (e) The defendant, by prior conduct and by conduct in the commission of the murders at hand has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

JA 154.

[18] With specific reference to the acts causing death, this portion of the Findings said "the murders were intentionally committed by Mark and Bryan Lankford, each of whom, with the assistance of the other, caused the skulls of a young couple, Mr. and Mrs. Bravence, . . . to be smashed." JA 158. They went on:

> Mark and Bryan . . . caused the skull of Mr. Bravence to be smashed. . . . Then the skull of Mrs. Bravence was caused to be smashed by the Lankfords. This court does not know how many times the head of Mr. Bravence and Mrs. Bravence was struck or with what their heads were struck. . . . This court does not know how many blows were struck by Bryan Lankford or how many blows were struck by Mark Lankford. The evidence clearly shows and this court finds that both Bryan Lankford and Mark Lankford committed acts of force and violence directly upon the persons of Mr. and Mrs. Bravence, which acts directly and proximately caused the deaths. . . . "

JA 159.

the sentencing hearing. See JA 158-163. After the court read its judgment, the hearing ended.[19]

C. The Postconviction Proceedings.

After sentencing and before appeal, pursuant to Idaho's consolidated capital appellate procedure,[20] Petitioner filed a Petition for Post Conviction Relief. JA 166. In that Petition he argued, among other things, that his rights under the United States Constitution had been violated by the "trial court's imposition of the death penalty despite the State's written notice that the State would not seek the death penalty." JA 168. The State moved for Summary Disposition, arguing that this issue was one for appeal which required no factual determinations. R. Post-Conviction, Vol. I, p. 214. Judge Reinhardt[21] rejected Petitioner's claim. These were the reasons he gave orally for that decision:

> The petitioner has failed to show that he did not have notice that the death penalty could be

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[19] Immediately after the pronouncement of Petitioner's sentence, Judge Reinhardt reconvened Mark Lankford's case, and sentenced him to death – in Findings which in large parts tracked those in Petitioner's case word for word.

[20] Idaho law provides for an expedited appellate procedure for capital cases. The post-conviction action must be brought before direct appeal, within 42 days of the imposition of sentence. Idaho Code § 19-2719 is the only State post-conviction action available, absent a showing of good cause.

[21] Petitioner unsuccessfully moved to recuse Judge Reinhardt from the Postconviction proceedings, in part because he was a witness to the underlying facts. R. Post-Conviction, Vol. I, p. 208.

imposed for the offenses he was found guilty for. Idaho Code 18-4004, says that punishment for first-degree murder is life imprisonment or death. Certainly, the statute serves as notice of what punishment might be imposed. The court made sentencing possibilities clear from the time the defendant first appeared in front of the magistrate. Furthermore, the petitioner's attorneys were well aware that the death penalty might be imposed. The fact that the prosecutor gave notice that he did not intend to seek the death penalty has no bearing on the adequacy of notice to petitioner that the death penalty might be imposed. The prosecutor's determination not to seek the death penalty does not eliminate it as a possible punishment. State's recommendation to the trial court is only advisably [sic], not binding.

JA 200. In his written Order denying the Postconviction Petition, Judge Reinhardt held:

> Petitioner was advised from the beginning of the proceedings that the death sentence could be imposed if he was convicted of the crimes with which he was charged. Petitioner knew that the court might impose the death penalty and that the State's recommendation in this regard was not binding on the Court.

JA 203. The Order did not specify the factual basis for these conclusions.

D. The Appeal.

The Idaho Supreme Court affirmed Petitioner's conviction and sentence. Like the trial court, the Idaho Supreme Court did not question whether Ms. Fisher actually knew, prior to the time judgment was pronounced,

that the death penalty remained a possibility in the case. Instead, it addressed the issue in terms of the constructive notice provided by the warnings regarding possible penalties given Petitioner at his arraignment, and the Idaho statutes defining those penalties:

> The record reflects that at his arraignment the district court expressly advised Lankford that the death penalty was a possible sentence for the crimes he was charged with. Additionally, the United States Supreme Court has pointed out that the "existence [of a death penalty statute] on the statute books provides fair warning as to the degree of culpability which the state ascribed to the act of murder." *Dobbert v. Florida*, 432 U.S. 282, 298, 97 S.Ct. 2290, 2300, 53 L.Ed.2d 344 (1977). Lankford has not cited us to any authority which supports his position that he was entitled to greater notice than that given by the statutes and by the district court.

State v. Lankford, 747 P.2d at 719; JA 220.

Following the Idaho Supreme Court's affirmance, Petitioner's Petition for Writ of Certiorari was granted by this Court and the judgment was vacated and the case remanded for further consideration in light of *Satterwhite v. Texas*, 486 U.S. 289 (1988). *Lankford v. Idaho*, 486 U.S. 1051 (1988); JA 274-275.

In its opinion on remand, in a three/two decision, the Idaho Supreme Court again affirmed Petitioner's sentence, without further comment on this issue. JA 276-288. This Petition followed.

SUMMARY OF ARGUMENT

It is established that a defendant at a capital sentencing hearing is entitled, at least, to the most basic elements of criminal due process: an opportunity to meet the evidence against him, and the effective assistance of counsel in doing so. *Gardner v. Florida*, 430 U.S. 349 (1977).

Notice that the death penalty is at issue at the sentencing hearing is fundamental to these guarantees. Without such notice, a defendant and his counsel cannot intelligently make any of the innumerable decisions about the preparation and conduct of the defense case that must be made before and during a capital sentencing proceeding.

Petitioner and his counsel were denied this most basic kind of notice. Whether or not the Idaho Supreme Court was correct in its determination that, in some circumstances, adequate notice of the possibility of a death sentence is provided by an admonition at arraignment and a generally applicable capital sentencing statute, those did not provide effective notice in this case. The general warnings at arraignment came months before the prosecutor filed a formal pleading which disavowed any request for a death sentence and appeared to take the death penalty out of the case. On its face, the Idaho statutes governing capital (and non-capital) sentencing appeared to require the "suggestion" of the prosecution that aggravating circumstances existed, before they could be found. Idaho Code § 19-2515(a). No reported case had held otherwise; to the contrary, a previous Idaho Supreme Court decision had referred to notice by the prosecution of its intent to seek the death penalty as

"mandated" by Idaho law. No Idaho capital defendant had been sentenced to death under this statute, where the prosecution did not seek the death penalty.

In circumstances involving much less momentous questions than life or death, this Court has held that constructive notice of the issues prior to a hearing is insufficient to satisfy due process, where actual notice can readily be provided. The lawyer who represented Petitioner at the sentencing hearing was not involved in the pretrial proceedings, and was denied a transcript of them. The only notice she actually received said the death penalty was *not* at issue; and, if counsel had looked past that, there was nothing in the state's law to reverse the impression it created. In that belief, counsel made no argument for her client's life. When the trial judge then reintroduced the death penalty into the case, by imposing it on the Petitioner, the Constitution was clearly violated.

ARGUMENT

I. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW BY THE LACK OF NOTICE THAT THE DEATH PENALTY WAS AT ISSUE, AFTER THE PROSECUTION HAD FORMALLY NOTIFIED THE DEFENSE AND THE COURT THAT IT WOULD NOT SEEK A DEATH SENTENCE AND WOULD NOT PROVE ANY STATUTORY AGGRAVATING CIRCUMSTANCES AT THE SENTENCING HEARING.

This case " 'involves the procedure' employed by the State in selecting persons who will receive the death

penalty." *Gardner v. Florida*, 430 U.S. 349, 363 (1977) (concurring opinion of Justice White). It presents a breakdown in the adversary system of a capital case which appears to be unique in the era since *Furman v. Georgia*, 408 U.S. 238 (1972).[22]

Petitioner's counsel took all her actions, before and during the sentencing hearing, in the belief that the death penalty was not at issue. Both the defense and prosecution shaped their case to the only question apparently before the court: the length of the minimum term the Petitioner should be required to serve before he would be eligible for parole. Neither side made any argument regarding the appropriateness of the death penalty or the existence of the prerequisite statutory aggravating factors. The reason for that is plain: There was no indication that those issues remained in the case, from the time that the prosecution filed its notice that the death penalty would not be sought, until the judge imposed the sentences of death.

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[22] In *Wiser v. State*, 459 S.W.2d 58 (Ark. 1970), a similar event occurred under a pre-*Furman* statute which required a jury determination of the sentence, regardless of the parties' agreement. The jury returned a death sentence despite the arguments of both defense counsel and the prosecutor for life. The Arkansas Supreme Court reversed, because the defendant had been informed at the time of the entry of his guilty plea that a death sentence could be imposed only "if asked by the State. . . . " 459 S.W.2d at 60.

An analogous due process violation occurred, as a result of a series of post-*Furman* statutory changes and retrials, in *Coleman v. McCormick*, 874 F.2d 1280 (9th Cir. 1988) (en banc), *cert. denied* 110 S.Ct. 349 (1989).

This is utterly inconsistent with everything this Court has said about the need for basic due process and special reliability in the decision to impose a capital sentence.

A. A Capital Defendant Is Entitled To The Due Process Of Law At The Sentencing Hearing, Which Includes The Effective Assistance Of Counsel And Notice Of The Matter At Issue.

In *Gardner v. Florida*, the Court held:

> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. *Mempa v. Rhay*, 389 U.S. 128; *Specht v. Patterson*, 386 U.S. 605. The Defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.

430 U.S. at 358 (plurality opinion). Justice White's concurring opinion in *Gardner* reached the same conclusion, from the premise that capital sentencing is qualitatively different from other sentencing proceedings. *Gardner v. Florida*, 430 U.S. at 364 (concurring opinion). That premise was established in *Woodson v. North Carolina*, 428 U.S. 280 (1976):

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life

> imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

428 U.S. at 305 (plurality opinion). It has since become an integral part of this Court's Eighth Amendment jurisprudence. *California v. Ramos*, 463 U.S. 992, 999 (1983). As the Court of Appeals for the Eleventh Circuit summarized it several years ago,

> The focus of the Court's current capital sentencing decisions has been toward minimizing the risk of arbitrary decision making. [Citations omitted]. Whereas earlier cases had focused on the quantity of information before the sentencing tribunal, recently the Court has shown greater concern for the quality of such information. *Gardner v. Florida*, 430 U.S. at 359, 97 S.Ct. at 1205. Thus, it has recognized the defendant's interest both in presenting evidence in his favor, *Eddings v. Oklahoma*, [455] U.S. [104], 102 S.Ct. 869, 71 L.Ed 2d 1 (1982); *Lockett v. Ohio, supra*, and in being afforded the opportunity to explain or rebut evidence offered against him. *Gardner v. Florida*, 430 U.S. at 362, 97 S.Ct. at 1207. Reliability in the fact finding aspect of sentencing has been a cornerstone of these decisions. *Id.* at 359-60, 362, 97 S.Ct. at 1205; *Woodson v. North Carolina*, 428 U.S. at 305, 96 S.Ct. at 2191.

Proffitt v. Wainwright, 685 F.2d 1227, 1253 (11th Cir. 1982), cert. denied 464 U.S. 1002 (1983). *See also Walton v. Arizona*, 110 S.Ct. 3047, 3060-61 (1989) (concurring opinion of Justice Scalia). In short, "fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt

determining phase of any criminal trial." *Presnell v. Georgia*, 439 U.S. 14, 16 (1978) (*per curiam*).

Sentencing proceedings generally are subject to certain basic due process protections. See *Specht v. Patterson*, 386 U.S. 605 (1967); *Townsend v. Burke*, 334 U.S. 736 (1948). The Court has not had occasion to specifically address whether those due process standards require any special notice of the issues in a noncapital sentencing proceeding.[23] However it would appear that, capital sentencing is "qualitatively different" from noncapital sentencing in at least three respects that make notice particularly crucial. First, post-*Furman* capital sentencing statutes, like Idaho's, provide for structured hearings, designed to minimize arbitrariness, which closely resemble trials on guilt or innocence. *Arizona v. Rumsey*, 467 U.S. 203 (1984). Second, the capital sentencing decision is a unique " 'reasoned *moral* response to the defendant's background, character and crime.' " *Penry v. Lynaugh*, 109 S.Ct. 2934, 2947 (1989), *quoting California v. Brown*, 479 U.S. 538, 545 (1987) (concurring opinion).[24] And third, the stakes involved in capital sentencing implicate the Eighth Amendment, which requires "that any decision to impose the death sentence be, and appear to be, based on

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[23] That issue is before the Court in *Burns v. United States*, No. 89-7260. Notably, the Solicitor General has conceded in its argument in that case that the law governing capital sentencing differs significantly from that applicable to noncapital sentencing, in this regard. *See* Brief of Respondent at 8 n.3, *Burns v. United States, supra*.

[24] *See also Satterwhite v. Texas*, 108 S.Ct. 1792, 1800 (1988) (concurring opinion of Justice Marshall).

reason. . . . " *Gardner v. Florida*, 430 U.S. at 358; *see Johnson v. Mississippi*, 108 S.Ct. 1981, 1986 (1988).

In matters of far less moment, the Court has held that notice of the matter in issue is a fundamental element of due process. The very essence of procedural due process is the "opportunity to be heard and its corollary, a promise of prior notice." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 550-51 (1978). "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence. . . . " *In re Oliver*, 333 U.S. 257, 273 (1948).[25]

[25] The importance traditionally attached to the provision of notice in legal proceedings is illustrated by the evolution of the system of pleading in English Common Law. *See* IX HOLDSWORTH, A HISTORY OF ENGLISH LAW, 328. "It is absolutely essential that the pleading . . . should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial," *Phillips v. Phillips*, 4 Q.B.D. at 139 (1878) (Cotton, L.J.), (quoted in IX HOLDSWORTH at 330 n.1). Commentators on America's pre-federal code pleading system also emphasize the notice function of such pleadings. *See* Blume, *Theory of Pleading – A Survey Including the Federal Rules*, 47 MICH. L. REV. 297 (1949), *quoting* Roscoe Pound *Report*, 35 A.B.A. REP. 614, 638 (1910) ("[P]leadings exist to notify parties of the claims, defenses and cross-demands of their adversaries . . . "). The shift to notice pleadings in modern federal practice does not reflect a reversal of this history. To the contrary, discovery and pre-trial motions practices actually increase the amount of notice given to the parties and the court. *See Hickman v. Taylor*, 329 U.S. 495, 501 (1946); WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 1202 (1987).

> Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defense.

Baldwn v. Hale, 68 U.S. 223, 233 (1864).

> "[T]he fundamental requisite of due process of law is the opportunity to be heard," *Grannis v. Ordean*, 234 U.S. 385, 394, 58 L.Ed. 1363, 34 S.Ct. 779 (1914), a right that "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." *Mullane v. Central Hanover Trust Co., supra*, at 314, 94 L.Ed. 865.

Goss v. Lopez, 419 U.S. 565, 579 (1973). "A party is entitled . . . to know the issues on which a decision will turn and to be apprised of the factual material on which the [decision maker] . . . relies for decision so that he may rebut it." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n.4 (1974); *see, e.g., Morgan v. United States*, 304 U.S. 1, 18-19 (1938); *Wolff v. McDonnell*, 418 U.S. 539, 563-64 (1974); *Vitek v. Jones*, 445 U.S. 480, 496 (1980).

> No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 171-172 (1950) (concurring opinion of Justice Frankfurter). In the criminal context, where the jeopardy of loss is greatest, the requirement of notice is most exacting.[26]

[26] The Sixth Amendment similarly includes a special requirement of notice of the nature of the charges in criminal prosecutions. *Givens v. Housewright*, 786 F.2d 1378 (9th Cir. 1986).

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Cole v. Arkansas, 333 U.S. 196, 201 (1948). In criminal cases due process requires "timely notice, in advance of the hearing, of the specific issues [the defendant] . . . must meet." *In re Gault*, 387 U.S. 1, 33-34 (1967).

Notice of the issue at hand is also a prerequisite to effective assistance counsel.

> A capital sentencing proceeding like the one involved in this case . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision . . . that counsel's role in the proceeding is comparable to counsel's role at trial – to ensure that the adversarial testing process works to produce a just result under the standards governing decision.

Strickland v. Washington, 466 U.S. 668, 686-87 (1984). To be effective, a lawyer must have "the opportunity to participate fully, and fairly in the adversary factfinding process." *Herring v. New York*, 422 U.S. 853, 858 (1975). "[T]he guiding hand of counsel," *Powell v. Alabama*, 287 U.S. 45, 69 (1935) can have little influence over a proceeding, the nature of which she does not know. A lack of notice of what is at issue undermines " 'the ability of counsel to make independent decisions about how to conduct the defense.' " *Perry v. Leeke*, 57 U.S.L.W. 4075, 4077 (U.S., January 10, 1989), *quoting Strickland v. Washington*, 466 U.S. at 686. To have a "debate between adversaries

. . . requires . . . giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." *Gardner v. Florida*, 430 U.S. at 360 (plurality opinion). When counsel cannot comment on such facts because she does not know the decision is being made, the "process loses its character as a confrontation between adversaries, [and] the constitutional guarantee [of effective counsel] is violated." *United States v. Cronic*, 466 U.S. 648, 656-57 (1984).

This proposition would seem to be beyond debate: the minimum protections of due process appropriate in this context cannot be provided without, at least, notification to the defendant and his counsel that the death sentence is at issue in the proceeding at hand.[27] We submit that constitutional minimum was not met here.

B. Petitioner's Counsel Had Neither Actual Nor Constructive Notice That The Death Sentence Could Be Imposed After The Prosecutor Formally Abandoned The Death Sentence.

Between the time she was appointed to represent Petitioner and the conclusion of all evidence-taking and

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[27] Many states go far beyond this, requiring notice to a defendant, not only of the fact that the death penalty is at issue, but also of the statutory aggravating factors upon which the state will rely, and the evidence it will present, to support its request for the death penalty. *See e.g., People v. Walker*, 222 Cal. Rptr. 169, 180 (1985); *Wright v. State*, 335 S.E. 2d 857, 863-864 (Ga. 1985); *State v. Hamilton*, 478 So. 2d 123, 129 (La. 1985); *State v. Timmons*, 469 A.2d 46, 51 (N.J. Super. 1983); *Greene v. State*, 713 P.2d 1032, 1038 (Ok. 1985) (*dictum*); *State v. Riddle*, 353 S.E.2d 138 (S.C. 1987). Because Petitioner's counsel was not even told the death penalty was at issue, the Court need not decide in this case whether, or when, notice of such specifics is required.

argument on sentence, Ms. Fisher was given no explicit notice that the death penalty was at issue at the sentencing proceeding. She was informed that, a week before her entry into the case, the prosecution had given formal, court-ordered notice that the death penalty was *not* being sought. At no time did the court express any dissatisfaction with the prosecutor's decision to forego the death penalty, indicate any intention to disregard or question that decision, or suggest that a death sentence remained a possible penalty in the case despite the prosecutor's express abnegation of it. Accordingly, Ms. Fisher interposed no objection, presented no evidence, and made no argument, directed at the issue of whether the death penalty should be imposed upon her client.

The Idaho Supreme Court nevertheless held that Petitioner's rights were not violated because he and/or his counsel should have known that death was still at issue. It gave two reasons for this: "at his arraignment the district court expressly advised Lankford that the death penalty was a possible sentence for the crimes he was charged with"; and "the 'existence [of a death penalty statute] on the statute books provides fair warning as to the degree of culpability which the state ascribed to the act of murder.' " *State v. Lankford*, 747 P.2d at 719 (JA 220), *quoting Dobbert v. Florida*, 432 U.S. 282, 298 (1977). Neither of these points can be fairly sustained.

1. The Notification To Petitioner At Arraignment.

It is certainly true that at the initial appearance on October 20, 1983, and at the arraignment on December 1,

1983 – the latter of which occurred over ten months before the sentencing hearing – Petitioner and his brother Mark were told by the court that "the maximum punishment that you may receive if you are convicted on either of the two charges is imprisonment for life or death." JA 4, 14-15.[28] However, that cannot answer the question here: whether Petitioner and his lawyer had adequate notice, almost a year later, that the death penalty remained in the case despite the prosecution's intervening, formal disavowal of any intention to seek the death penalty.

Petitioner's trial lawyer was with him at the time of the arraignment.[29] But later, after trial, that lawyer led Petitioner to believe the death penalty was no longer a possibility – even before the prosecution filed its formal notice that it would not seek death. JA 78. When that formal notice came, Petitioner could only interpret it as meaning what it appeared to say: that the death penalty was no longer at issue. Certainly, nothing in the record told him anything different.

In any event, notice to a client, recorded in a transcript in a court file, is no substitute for actual notice to the client's lawyer, on matters of which counsel must be aware to provide effective representation. *Satterwhite v. Texas*, 108 S.Ct. 1792, 1797 (1988). Petitioner's lawyer at sentencing, Ms. Fisher, was not in the case at the time of

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[28] The court's reference to the possible penalties was part of an extended series of warnings and advisements, preliminary to the entry of a plea. Tr. 12/1/83 at 6-17.

[29] Petitioner had no lawyer at the preliminary appearance. JA 3.

the initial appearance, the arraignment, or any proceedings prior to the prosecutor's notice that it was not seeking death. The transcripts of these earlier proceedings were not prepared until long after the sentencing – despite counsel's request that she be provided such transcripts so she could familiarize herself with the events that had transpired before her entry into the case. JA 46, 54-55. From the time of her appointment until the end of the sentencing hearing, nothing was said in Ms. Fisher's presence indicating that she was involved in a death penalty case.

In the context and in the circumstances of this case, the trial court's brief reference to possible penalties during the initial appearance and arraignment added nothing to the statutory background which set the maximum possible penalties for the offenses charged. These preliminary proceedings, long pre-dating the prosecution's election to forswear the death penalty, provided no greater notice than the capital punishment statutes themselves. If those statutes were not adequate to notify Petitioner and his counsel of the peril of a death sentence at the later sentencing hearing – and we argue below they were not – certainly their summarization by the judge, long before the prosecution announced its election, was not.

2. The Constructive Notice Given By Idaho Law.

The Idaho Supreme Court's ruling that the statutes providing for the death penalty for first degree murder provided "fair warning," which was substituted for

actual notice to defense counsel of the issues at hand – is both legally and factually unsupportable in this case.

There is a significant difference, as a matter of due process and under the Sixth Amendment, between actual and constructive notice to a defendant and his counsel regarding the nature and pendency of proceedings affecting fundamental rights. *See Satterwhite v. Texas*, 108 S.Ct. at 1797. To satisfy due process, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). It is long since settled that constructive notice is insufficient where actual notice is practicable. *Ibid; Robinson v. Hanrahan*, 409 U.S. 38, 49 (1972); *Schroeder v. New York*, 371 U.S. 208, 212-214 (1962).

Certainly, in the circumstances here, constructive notice was neither fair nor legally adequate.[30] Although

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[30] The Idaho Supreme Court was wrong in resolving this issue by reference to the standard of "fair warning" found in the *ex post facto* caselaw exemplified by *Dobbert v. Florida*, 432 U.S. 282 (1977). What is in question here is "due process of law 'in its primary sense of an opportunity to be heard and defend [a] . . . substantive right.' " *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964), *quoting Brinkerhoff-Ferris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930). The notice required to satisfy due process in that sense is very different from the generalized "fair warning that . . . contemplated conduct constitutes a crime," 378 U.S. 355, which is the focus of the *ex post facto* clause. *See Collins v. Youngblood*, 110 S.Ct. 2715 (1990). The "fair warning" principle does not prevent a person from being prosecuted for violating any criminal statute that was on the

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counsel knew a sentencing proceeding was taking place, she had no way of knowing what were the stakes, and her client's interests, in that proceeding. She had every right to assume that, if the death penalty were at issue, some kind of notice would have been given to her to that effect. *Cf. New York v. New York, New Haven, and Hartford RR Co.*, 344 U.S. 293, 297 (1953). Counsel not only had no notice that the death penalty was at issue; she was provided a formal notification that the death penalty was *not* at issue. That created "a false sense of security," which compounded the due process violation here. *Cf. Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964).

Factually, the Idaho Supreme Court's point is unsupportable because nothing in Idaho law said the death penalty could remain in issue after a prosecutor's formal notice to the contrary. The general state sentencing statute provided for hearings "upon the oral or written suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment . . . and upon such notice to the adverse party as [the court] . . . may direct." Idaho

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books at the time when he or she acted, even though no state official had called the particular statute to the person's attention. But the prosecution could not proceed under an indictment charging the defendant simply with "violating an extant statute by doing something unlawful"; such a charge would plainly affront due process. *Cole v. Arkansas, supra*. It is, in other words, one thing to be on notice of what the law is for purposes of the obligation to obey it; it is quite another thing to have adequate notice of what is in controversy in a legal proceeding that one is called upon to defend.

Code § 19-2515(a). By all appearances, this explicit notice provision applied to death penalty proceedings, conducted under Sections 19-2515(c)-(f); and those subsections, too, indicated that notice of the issues, prior to a death sentencing hearing, was required.[31] No Idaho case had held otherwise. Indeed, only the year before the Idaho Supreme Court had referred to "notice that the State intended to ask for the death penalty and . . . notice of the State's intent to rely on the aggravating circumstances set forth in I.C. § 19-2515(f)" as among "the procedures mandated in potential death penalty cases" in Idaho. *State v. Gibson*, 106 Idaho 54, 675 P.2d 33, 42 (1983).[32] In no Idaho case, at that time or since, had a

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[31] *See* Idaho Code § 19-2515(c):

> The state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence."

See State v. Osborn, 102 Idaho 405, 631 P.2d 187, 196 (1981) ("Here, the district court expressly informed counsel to disclose the evidence and arguments to be relied upon at the hearing, *and the state did so inform the appellant*." (Emphasis added.))

[32] The law of the state of Idaho applicable to other, analogous contexts, reinforced this by requiring specific notice of the prosecution's intent to seek other types of sentence enhancement. *See State v. Lovejoy*, 60 Idaho 632, 95 P.2d 132, 134 (Idaho 1939) (persistent felony offender). *See also* Idaho Code § 19-2520

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defendant received a death sentence without a request by the state.

Understood against this background, the due process violation here goes beyond a lack of notice. Defense counsel believed, and had every reason to believe, that the prosecutor's action took the issue of the death penalty out of the case. There was no reason to believe that the trial court's order for formal notice of the prosecution's intention was an empty gesture. There was every reason to believe it was intended to do what it appeared to do: to enable defense counsel to prepare to meet an argument for the death penalty, if that was to be at issue in this case. There was no indication, after that notice was given, that the court intended to disregard it, until it was far too late to repair the damage or to put on a viable case against death.

Thus, the proceedings below offend the due process prohibition against procedures which not only fail to inform, but affirmatively mislead, a party and his counsel about the nature of the issues or the potential consequences of their acts.[33] The Idaho Supreme Court's

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(firearm or deadly weapon enhancement); Idaho Code § 19-2520(B)(4) (enhancement for infliction of "great bodily injury"); Idaho Code § 19-2520(C)(4) (enhancement for repeat sex offenses, extortion or kidnapping). *Cf. State v. Edelblute*, 91 Idaho 469, 424 P.2d 739, 750 (1967) (probationer must "be informed of the allegedly violated term or condition of the probation order and the manner and circumstances of his violation so that he can intelligently prepare his defense").

[33] *Bouie v. City of Columbia*, 378 U.S. at 352; *In re Ruffalo*, 390 U.S. 549 (1968); *Raley v. Ohio*, 360 U.S. 423 (1959); *Doyle v. Ohio*, 426 U.S. 610, 619 (1976).

hindsight decision that, as a matter of state law, the prosecutor's notice did not mean what it appeared to say, cannot retroactively change that fact.

CONCLUSION

The judgment of the Idaho Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

RELEVANT IDAHO CODE SECTIONS

Idaho Code § 18-4001. Murder defined. Murder is the unlawful killing of a human being with malice aforethought or the intentional application of torture to a human being, which results in the death of a human being. Torture is the intentional infliction of extreme and prolonged pain with the intent to cause suffering. It shall also be torture to inflict on a human being extreme and prolonged acts of brutality irrespective of proof of intent to cause suffering. The death of a human being caused by such torture is murder irrespective of proof of specific intent to kill; torture causing death shall be deemed the equivalent of intent to kill.

Idaho Code § 18-4002. Express and implied malice. Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Idaho Code § 18-4003. Degrees of murder.

(d) Any murder committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem is murder of the first degree.

Idaho Code § 19-2515. Inquiry into mitigating or aggravating circumstances – Sentence in capital cases – Statutory aggravating circumstances – Judicial findings.

(a) After a plea or verdict of guilty, where a discretion is conferred upon the court as to the extent of the

punishment, the court, upon the oral or written suggestion of either party that there are circumstances which may be properly taken into view either in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily, at a specified time, and upon such notice to the adverse party as it may direct.

(b) Where a person is sentenced to serve a term in the penitentiary, after conviction of a crime which falls within the provisions of section 20-223, Idaho Code, except in cases where the court retains jurisdiction, the comments and arguments of the counsel for the state and the defendant relative to the sentencing and the comments of the judge relative to the sentencing shall be recorded. If the comments are recorded electronically, they need not be transcribed. Otherwise, they shall be transcribed by the court reporter.

(c) Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.

(d) In all cases in which the death penalty may be imposed, the court shall, after conviction, order a presentence investigation to be conducted according to such procedures as are prescribed by law and shall thereafter convene a sentencing hearing for the purpose of hearing

all relevant evidence and arguments of counsel in aggravation and mitigation of the offense. At such hearing, the state and the defendant shall be entitled to present all relevant evidence in aggravation and mitigation. Should any party present aggravating or mitigating evidence which has not previously been disclosed to the opposing party or parties, the court shall, upon request, adjourn the hearing until the party desiring to do so has had a reasonable opportunity to respond to such evidence. Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing. Evidence offered at trial but not admitted may be repeated or amplified if necessary to complete the record.

(e) Upon the conclusion of the evidence and arguments in mitigation and aggravation the court shall make written findings setting forth any statutory aggravating circumstance found. Further, the court shall set forth in writing any mitigating factors considered and, if the court finds that mitigating circumstances outweigh the gravity of any aggravating circumstance found so as to make unjust the imposition of the death penalty, the court shall detail in writing its reasons for so finding.

(f) Upon making the prescribed findings, the court shall impose sentence within the limits fixed by law.

(g) The following are statutory aggravating circumstances, at least one (1) of which must be found to exist beyond a reasonable doubt before a sentence of death can be imposed;

(1) The defendant was previously convicted of another murder.

(2) At the time the murder was committed the defendant also committed another murder.

(3) The defendant knowingly created a great risk of death to many persons.

(4) The murder was committed for remuneration or the promise of remuneration or the defendant employed another to commit the murder for remuneration or the promise of remuneration.

(5) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(6) By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life.

(7) The murder was one defined as murder of the first degree by section 18-4003, Idaho Code, subsections (b), (c), (d), (e), or (f), and it was accompanied with the specific intent to cause the death of a human being.

(8) The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

(9) The murder was committed against a former or present peace officer, executive officer, officer of the court, judicial officer or prosecuting attorney because of the exercise of official duty.

(10) The murder was committed against a witness or potential witness in a criminal or civil legal proceeding because of such proceeding.

Idaho Code § 19-2516. Inquiry into circumstances – Examination of witnesses. The circumstances must be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section.

Idaho Criminal Rule 32. Standards and Procedures Governing Presentence Investigations and Reports.

The following standards and procedures shall govern presentence investigations and reports in the Idaho courts:

(a) When presentence investigations are to be ordered. The trial judge need not require a presentence investigation report in every criminal case. The ordering of such a report is within the discretion of the court. With respect to felony convictions, if the trial court does not require a presentence investigation and report, the record must show affirmatively why such an investigation was not ordered.

(b) Contents of presentence report. A trial judge may request a record check and other background information concerning the defendant prior to sentence without conducting a full presentence investigation of the defendant. However, whenever a full presentence report is ordered, it shall contain the following elements:

(1) The description of the situation surrounding the criminal activity with which the defendant has been charged, including the defendant's version of the criminal act and his explanation for the act, the arresting officer's version or report of the offense, where available, and the victim's version, where relevant to the sentencing decision.

(2) Any prior criminal record of the defendant.

(3) The defendant's social history, including family relationships, marital status, age, interest and activities.

(4) The defendant's educational background.

(5) The defendant's employment background, including any military record, his present employment status and capabilities.

(6) Residence history of the defendant.

(7) Financial status of the defendant.

(8) Health of the defendant.

(9) The defendant's sense of values and outlook on life in general.

(10) The presentence investigator's analysis of the defendant's condition. That analysis of the defendant's condition contained in the presentence report should include a complete summary of the presentence investigator's view of the psychological factors surrounding the commission of the crime or regarding the defendant individually which the investigator discovers. Where appropriate, the analysis should also include a specific recommendation regarding a psychological examination and a plan of rehabilitation.

(c) Recommendations concerning sentence. The presentence report may recommend incarceration but it should not contain specific recommendations concerning the length of incarceration, the imposition of a fine or the amount of a fine, or the length of probation or other matters which are within the province of the court. Provided, however, the presentence report may comment generally on the probability of the defendant's successfully completing the term of probation or the defendant's financial ability to pay a fine imposed by the court.

(d) Psychological evaluations. The presentence investigator may recommend a psychological evaluation, but the decision as to whether to order a psychological evaluation is to be made by the sentencing judge.

* * *

Idaho Criminal Rule 33. Sentence and Judgment.

(a) Sentence. (1) Time for judgment and sentence. After a plea or verdict of guilty, if the judgment be not arrested nor a new trial granted, the court must appoint a time for pronouncing judgment and sentence, which, in cases of felony, must, unless waived by the defendant, be at least two (2) days after the verdict. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally to ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. Pending sentence the court may commit the defendant or continue or alter the bail.

* * *

Idaho Criminal Rule 33.1. Procedure Where Death Penalty Is Authorized.

(a) Presentence investigation and sentencing hearing. Whenever a defendant has been found guilty by a jury or has entered a plea of guilty to an offense for which the death penalty is authorized, the trial court shall first order a presentence investigation to be conducted and presented to the court as provided in Rule 32. After receiving the presentence investigation report, and delivering a copy thereof to the defendant or his counsel and to the prosecuting attorney, the court shall upon at least seven (7) days' notice to the parties, hold a sentencing hearing for the purpose of hearing all relevant evidence and arguments of counsel in aggravation and mitigation of the offense as provided in section 19-2515, Idaho Code.

(b) Findings of the trial court in capital offenses. After the trial court has held a sentencing hearing involving an offense for which the death penalty is authorized, the trial court shall then make written findings as required by section 19-2515(d), Idaho Code. The trial court shall serve copies of these written findings upon the defendant or his counsel and the prosecuting attorney.

* * *

No. 88-7247

In The

Supreme Court of the United States

October Term, 1990

BRYAN STUART LANKFORD,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Idaho

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

A. The Offense

Bryan Lankford was convicted of two counts of first-degree murder and sentenced to death for his participation in the intentional killings of Robert Bravence, a young Marine Corps officer, and his wife, Cheryl.

The Bravences were camping in the forest near Grangeville, Idaho, in June of 1983. Bryan Lankford and his brother Mark were in the same area, having fled the state of Texas to avoid the possibility that Bryan might be imprisoned for a probation violation. See Trial Tr., Vol. IV, p. 683. The Lankford brothers decided to abandon their automobile and hid it in the woods camouflaged with tree branches. *State v. Lankford*, 747 P.2d 710 (1987). Catching sight of the Bravences, Bryan and his brother decided to steal their Volkswagen van. In a statement made to an FBI agent, Bryan stated that after an hour of discussion he and Mark entered the Bravences' camp. Bryan was carrying a shotgun, which he aimed at Robert Bravence while Mark ordered Bravence to kneel down on the ground. Trial Tr., Vol. III, p. 529, ll.13-15. Bryan gave this description of the murders:

> Mark . . . hit the man over the head with a nightstick like a policeman uses. . . . The woman came up from a nearby creek about that time, and Mark told her to get on the ground. She said something about her husband being hurt on the ground; and, then, she got on the ground. Mark then hit the woman over the head with the same nightstick that he had hit the man on the head with. *Id.*, ll. 15-23.

The Bravences had been beaten to death with such force that their skulls had to be reconstructed by an anthropologist before the cause of death could be scientifically determined. *Lankford, supra.*

Bryan Lankford was not charged with "felony murder" by vicarious liability, as his brief seems to suggest.[1] In each count, Lankford was charged as a principal with "knowingly, willfully, unlawfully, intentionally, feloniously and with malice aforethought" killing the victim named "by beating such person with an unknown foreign object until the said victim . . . died of injuries . . . sustained." JA pp. 10-11. In each count it was also asserted that the murderous acts of the defendant were carried out in the perpetration of a robbery and that death had been inflicted in furtherance of the robbery. *Id.*

Lankford was tried before The Honorable George R. Reinhardt, III, and was represented on appointment at trial by W. W. Longeteig, a highly experienced attorney who had enjoyed considerable success in the defense of criminal cases. Tr., Postconviction Proceedings, June 24, 26, 1985, pp. 111-120.

The jury was instructed respecting the liability of an aider and abettor who participates in a murder committed during the course of a robbery and was told, in addition to what is set forth in the petitioner's brief, that:

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[1] Idaho law defines an aider and abettor as a principal. Idaho Code § 18-204. The Idaho Supreme Court has held that the death penalty may be imposed on an aider and abettor convicted as a principal. *State v. Paradis*, 676 P.2d 31 (Idaho 1983).

> If two or more persons acting together are perpetrating a robbery and one of them, in the course of the robbery and in furtherance of the common purpose to commit the robbery, kills a human being, both the person who committed the killing and the person who aided and abetted him in the robbery are guilty of murder in the first degree. JA p. 17.

The court also instructed the jury that it could not convict unless it found that Bryan Lankford had acted with malice aforethought, R., Vol. II, p. 268; 264, which was defined, R., p. 264, and that *murder* required malice aforethought. R., Tr., Vol. II, p. 261. The provision of Idaho Code § 18-4003(d) that any murder committed in the perpetration of, or attempt to perpetrate a robbery is murder of the first degree, was recited by the court. R., Vol. II, p. 261. The elements of the offense were correctly explained to the jury, and the jury was told that it would have to find the existence of each element beyond a reasonable doubt.

The instructions were consistent with the general principle that malice may be attributed to one who participates in the events leading to the application of deadly force, knowingly, even though he did not have the specific intent to personally apply such force. See, e.g., *State v. Paradis*, 676 P.2d 31 (Idaho 1983); *People v. Ireland*, 450 P.2d 580 (Cal. 1969).

In reviewing the appropriateness of the death penalty, the Idaho Supreme Court found that Bryan had acted with the degree of culpability attributable to a principal in the commission of the offense:

> In this case, Lankford was found guilty of a savage murder against two innocent campers

who were selected because they owned a van which the defendant intended to steal. Lankford came into their camp wielding a shotgun which must have ultimately led to Mr. Bravence's . . . subservient compliance with Lankford's brother's order to kneel on the ground where he was bludgeoned to death. Jurors could reasonably have inferred that Mr. Bravence complied with the demand to kneel on the ground because of the defendant's menacing display of the shotgun. After Mr. Bravence was mortally wounded, Mrs. Bravence returned from the creek. She was ordered onto the ground and unmercifully killed by a blow to the head without a word of protest from Lankford. Although Lankford testified that he did not intend that the Bravences die, Lankford not only participated in the murders, but he did nothing to prevent his brother from bludgeoning Mrs. Bravence after he had witnessed the savage consequences of the nightstick attack on Mr. Bravence. The attack was brutal and one that could only have been intended to kill the victims because of the severity of the blows. The district court judge was entirely justified in finding from the facts that Lankford was a major participant in the killings and that he intended that the Bravences die. JA 237-238.

B. Sentencing Proceedings

On April 5, 1984, shortly after Lankford had been convicted of the Bravence murders, Judge Reinhardt convened a hearing for the purpose of scheduling proceedings for sentencing. JA pp. 20-21. In an order dated May 17, 1984, the court set the hearing for June 28, 1984, and ordered that on or before June 18, 1984, "the State shall notify the Court and the Defendant in writing whether or

not the State will be seeking and recommending that the death penalty be imposed herein." JA p. 23. The court also required the state to identify statutory aggravating circumstances on which it intended to rely in the event it sought the death penalty. *Id*.

The June 18 sentencing hearing was vacated. On July 9, 1984, Lankford was brought before the court to discuss a request for a new attorney. JA pp. 18-19. Lankford stated that he intended to hire another lawyer. *Id*. The court tried to encourage Lankford to work out his differences with his attorney:

> THE COURT: All right. So, at this particular point in time you're satisfied that what we'll do is attempt to let you people communicate more. He said he wants to call you a couple of times a week even if he doesn't have anything to tell you.
>
> MR. LANKFORD: That's fine. That's fine. You know, I'm going to hire another lawyer; and, if they can work together, everything will be just fine. JA pp. 18-19.

Lankford had become increasingly uncooperative about preparing for his sentencing proceeding. Mr. Longeteig testified in postconviction proceedings that he "just couldn't get [Lankford] to respond to anything that bore on sentencing position." Tr., Postconviction Hearing, June 24, 26, 1985, pp. 140-141.

An additional delay was encountered when Lankford, on August 1, 1984, filed a "motion to dismiss counsel and overturn conviction," in which Lankford claimed that he was mentally ill and incompetent prior to trial. Tr., Postconviction Proceedings, p. 5. Lankford was then

transferred to a state institution for a psychological evaluation and, after receiving it in mid-September, the court set a hearing on the issue of representation for September 20, 1984. *Id.*

On September 6, 1984, the court set sentencing for October 12, 1984. JA pp. 24-25. The state was again ordered to notify the court and the defendant whether it intended to seek the death penalty. *Id.* In response to this order, the prosecuting attorney filed notice that he would not be "recommending" the death penalty. JA p. 26.

At the hearing conducted September 20, 1984, the court observed that Lankford's counsel had stated he felt he could continue to fully and fairly represent Lankford, but had expressed concern that Lankford did not trust him. Tr., Postconviction Proceedings, p. 7. Lankford responded:

> THE DEFENDANT: Well, I would like to speak to another lawyer before I make a decision to keep the motion or withdraw it, and I haven't been able to do so up to this point because I feel there are a lot of things that should have been done that weren't done, and the main reason that I have trouble with my counsel is because it's my understanding and it's – this came from a client of Greg FitzMaurice, that my counsel was asked to roll over on this case before my trial ever started, and I didn't – I just can't seem to get to the bottom of this.
>
> MR. LONGETEIG: For the record, Your Honor, I would like to state there is absolutely no truth to that rumor. I can see why that would bother him. Tr., September 20, 1984, p. 7.

At this point, twenty-two days before the scheduled sentencing hearing, the court was concerned that it not fall victim to strategies of intentional delay contrived by the defendant. Although Judge Reinhardt thought it appropriate to appoint co-counsel to work with Mr. Longeteig, he made it clear that the appointment would not automatically be justification for a continuance:

> THE COURT: And in the event you had notions of hiring private counsel, that private attorney very well may tell me that he's not in a position to attend your sentencing hearing on the 12th because of prior obligations or inability to properly prepare because of a prior hearing schedule and, then, that attorney would be requesting a continuance of a sentencing date from me, and if you contacted counsel, for instance, on the 11th of October and made such a request, you should not think that I will automatically grant that request for a continuance.
>
> THE DEFENDANT: I don't think that at all.
>
> THE COURT: Pardon me?
>
> THE DEFENDANT: I don't think that – I'm not taking it for granted that you would do that.
>
> THE COURT: Right. And the reason for that is, as you can very well see, that if I do postpone sentencing until December 1st and you come to me at the end of November and say, "I want to fire him because I can't get along with him." The new lawyer comes to me and says, "I can't get ready for a sentencing tomorrow; I want a postponement," and on and on forever, and it gets to the point where, obviously, you can never be sentenced.
>
> THE DEFENDANT: I want to be sentenced as soon as possible, but I want to be fairly represented.

> THE COURT: I understand that, and that's why I've decided to appoint co-counsel in this case. JA pp. 30-31.

Joan Fisher, who was to be appointed co-counsel, was present and told the court that she was in a position to take on the case. JA p. 32. Shortly thereafter, on October 2, Ms. Fisher moved to continue the sentencing hearing because Gretchen Maurer of San Antonio, Texas, Lankford's mother, was ill and would not be able to attend for approximately four weeks.[2] JA p. 35. Mrs. Maurer's testimony would have been to the effect that Bryan was nonviolent, amenable to rehabilitation, and dominated by his violent brother Mark, and that she did not believe Bryan was involved in the murders. JA pp. 36-37.

Ms. Fisher moved, on October 2, 1984, to dismiss Mr. Longeteig as Lankford's attorney. Tr., Post-trial Motions, p. 14.

On October 5, Ms. Fisher moved to continue a new trial motion and the sentencing proceeding on the conclusory assertion that, after diligent investigation, "defendant's attorney . . . has determined . . . that it is impossible to adequately represent the defendant at the sentencing and motion for new trial without further investigation, preparation, and research of the matters therein." JA p. 38. Lankford also asked for a typewritten transcript of the trial. JA p. 46.

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[2] Lankford had forbidden his previous attorney to contact Maurer. JA p. 72.

The court took up the motions on October 10, 1984. JA p. 51. Judge Reinhardt again warned Lankford that a change of representation would not automatically result in a continuance of the October 12 sentencing hearing. The judge explained that Mr. Longeteig, the prosecutor and the court were all prepared for sentencing and that the court was concerned with possible strategies of intentional delay:

> THE COURT: [B]y putting Ms. Fisher in here at your request at the last moment and, then, dismissing Mr. Longeteig may result in a situation and will result in a situation, I'm sure, that she will be asking for a continuance or a postponement and, again, I will reiterate that I am not in a position to grant a continuance simply because she asks for one. I am also not indicating that the reason you are moving for a continuance is to simply delay sentencing or postpone punishment in this case, but I say that because it is a common occurrence and one the courts are faced with on a regular basis. So, again, I simply reiterate to you that simply because you're complaining about Mr. Longeteig, simply that now you're moving to dismiss him, does not mean that you'll secure or gain, automatically, a continuance of your sentencing today. On the other hand, as I said, the Constitution does dictate or require that I not force you to have counsel if you don't want that counsel, and are you standing, therefore, on your motion to dismiss Mr. Longeteig?
>
> THE DEFENDANT: Yes, I am.
>
> JA p. 53

Mr. Longeteig was dismissed as counsel, but was asked to be available to assist Ms. Fisher. His assistance

was not sought by either Lankford or his new attorney. Tr., Postconviction Proceeding, June 24, 26, 1985, p. 141.

The court denied the motion for a typewritten transcript because preparation of the transcript could not be accomplished prior to the sentencing hearing. JA p. 61. Before denying the motion, the court considered the availability of alternative sources of information and found (1) that Ms. Fisher had, for some time, had access to the preliminary hearing transcript which, according to Mr. Longeteig, in all material particulars contained the same information that was presented at trial, JA pp. 56-58; (2) that Ms. Fisher had reviewed the transcript of the preliminary hearing, JA p. 55; (3) that there was as well an existing transcript of Bryan's trial testimony; and (4) that trial audio tapes were available for Ms. Fisher to compare with the preliminary hearing transcript. JA p. 61.

The court was persuaded a continuance was not necessary to ensure that Lankford had an opportunity to present all relevant mitigating evidence and denied the motion. The court offered to receive the evidence of Gretchen Maurer by affidavit and pointed out that Lankford's offer of evidence would be cumulative. JA pp. 87-88. The court also noted that some of the issues Lankford was raising by way of his new trial motion were suited for postconviction review. JA p. 70.

When Lankford's counsel on the day of sentencing again asked for a continuance, the court responded:

> THE COURT: It's my feeling, and, again, I will reiterate this, that the factors which have resulted in your coming on board at this particular stage were brought about by Mr. Bryan Stuart Lankford in [an] effort to delay these proceedings, and I feel, furthermore, that a continuance will not provide you with any significant or additional information that you may need for sentencing. JA p. 100.

The state called no witnesses at the sentencing hearing. JA pp. 96-97. Lankford, however, called seven witnesses in mitigation, Tr., Sentencing, October 12, 1984, pp. 216, et seq., including his grandmother, an aunt, his sister, three family friends, and a psychiatrist. *Id.* The friends and relatives described Lankford's abusive father and Bryan's domination by his violent brother Mark. These witnesses testified generally that Bryan was not a violent person, was not a threat to society, and would be amenable to rehabilitation. They did not believe him to be capable of murder. Tr., Sentencing, October 12, 1984, pp. 216 et seq. The psychiatrist, Dr. Estess, testified that Bryan had some capacity to relate to other people and that there was a reasonable possibility that, over time, he would develop a healthier approach to life. *Id.* at p. 300. He conceded that Bryan was manipulative and dishonest and that he thought Bryan stayed with Mark because by doing so he was able to avoid feeling personally responsible for his own behavior. Tr., Sentencing, October 12, 1984, pp. 309-310.

C. Notice of the Risk of the Death Penalty

At all relevant times, Idaho Code § 19-2515(c) provided that, upon the finding of one or more statutory aggravating circumstances, the sentencer "shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the

gravity of any aggravating circumstance found and make imposition of death unjust." Two statutory aggravating circumstances were facially evident: (1) "At the time the murder was committed the defendant also committed another murder," and (2) murder committed in the course of a robbery accompanied by specific intent to cause death. Idaho Code § 19-2515(g)(2); (7).

Furthermore, Lankford and his counsel were alerted to the risk of the death sentence on several occasions spanning the case from beginning to end.

When Lankford was taken before a magistrate for an initial appearance, he was told by the magistrate that the penalty for murder was "either a life sentence or the death penalty." JA p. 4. On December 1, 1983, Lankford was arraigned before the district court, at which time the judge explained that "subject to the provisions of 19-2515 Idaho Code: Every person guilty of murder in the First Degree shall be punished by death or by imprisonment for life." JA p. 14. Lankford said he understood. JA pp. 14-15.

Although Lankford's trial attorney, Mr. Longeteig, did not believe Lankford would be sentenced to death, he knew that the death penalty could not be ruled out, as did Lankford himself. JA pp. 73, 78.

Lankford and his counsel had even greater reason to appreciate the risk of the death penalty when the trial judge refused to accept a plea and sentence bargain, to which the prosecuting attorney had agreed, providing that Lankford would not be sentenced to death. JA pp. 79-80; 86.

Lankford himself expressed the view that his life was "on the line" in July, 1984, at the time he was complaining to the court about his trial counsel. JA p. 18.

At the sentencing hearing on October 12, 1984, Ms. Fisher argued vigorously in favor of an indeterminate life sentence, relying heavily on the mitigating evidence presented by Lankford's witnesses. She asserted that Lankford was less culpable than his brother and that he was worth an effort at rehabilitation. She touched also on her understanding of what the judge would consider his sentencing options to be.

> MS. FISHER: . . . I think [the prosecutor's recommendation is] important because I don't know where the court is. You know, I've had an indication from the testimony that the court rejected making an opinion prior to trial on that option. Tr., Sentencing, October 12, 1984, p. 319.

At the conclusion of the sentencing hearing, the trial judge announced that he needed some time to study the case and to prepare his findings before deciding the sentence. He stated that the sentencing options included a life sentence "or death." JA p. 114. At this time, the judge also announced that, because of the aggravated nature of the offense, he would not accept the prosecuting attorney's sentencing recommendation. JA 117-118. Judge Reinhardt left no doubt that he thought the recommendations of both the prosecutor and the defendant's counsel inappropriate:

> In view of the recommendation or suggestion that I run the two sentences concurrently, the recommendation would be, in essence, that the court sentence Bryan Lankford to spend, from this day, less than five years in the penitentiary

> for the murder of each one of the two Bravences, whose names have not yet been spoken today.
>
> * * *
>
> . . . I think that this sentence that has been recommended to me would be contrary to the best interest of society. It would certainly depreciate the seriousness of the crimes that Bryan Lankford has been convicted of, and, in my opinion, seriously undermine the faith that society has in the judicial process. Tr., Sentencing, October 12, 1984, pp. 331, 333.

Lankford's sentencing counsel, Ms. Fisher, made no objection to the court's willingness to consider the death penalty, saying instead that "the only objection I have is that if we can't get sentencing today – I couldn't get a continuance. I mean I made a motion for a continuance. I've got my client prepared to be sentenced today. You know, it seems like the court is playing with him." JA pp. 118-119.

SUMMARY OF ARGUMENT

Idaho law provides that the judge shall pass sentence in capital cases and that the prosecuting attorney's recommendation is not binding on the sentencing authority. The sentencing judge is required to consider the possibility of the death penalty irrespective of what action the prosecutor takes. These features of Idaho law, together with the statutory provision for the death penalty in cases of first degree murder, gave notice to Lankford that he faced the risk of the death penalty.

In addition, Lankford was advised at his arraignment that the death penalty was possible. He was also given this information by his attorney and by the sentencing court prior to the pronouncement of sentence. Lankford's attempt to obtain a plea and sentence bargain which would have insulated him from the death penalty was rejected by the sentencing court prior to trial.

The due process clause does not require giving notice of applicable rules of law or of the standards the sentencing authority may apply in exercising discretionary factors of judgment. By sentencing Lankford to death, even though the prosecuting attorney recommended a lesser sentence, the sentencing judge merely exercised the judgment required of him by Idaho law, and the defendant should be charged with knowledge that the judge would proceed in this fashion.

Lankford's claim that he was denied the Sixth Amendment right to effective assistance of counsel by the trial court's failure to notify him that it intended to consider the death penalty was not properly preserved by presentation to the state courts. The claim must fail on the merits because Lankford had sufficient statutory and factual notice to enable him to prepare for the sentencing hearing. Lankford made a fully adequate presentation of mitigating evidence despite the claimed lack of notice.

ARGUMENT

LANKFORD HAD CONSTITUTIONALLY SUFFICIENT NOTICE OF THE ISSUES HE WOULD BE REQUIRED TO MEET AND THE FACTS PERTINENT TO SUCH ISSUES

A. Notice of the Penalty for Murder Was Provided By State Statute and Actual Notice Was Given

The enactments of a legislative body give legally sufficient notice of their contents without specific action to inform citizens individually of the way they might be affected by the operation of a statute. *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). Every person is presumed to know the law. *Traynor v. Turnage*, 485 U.S. 535 (1988). Analysis of Lankford's claim that he was denied due process of law because he did not have notice that the death penalty might be imposed must therefore begin by taking account of what the statutes and judicial decisions allowed in the particular circumstances of his case.

Idaho law provides that the death penalty may be imposed for first-degree murder if one or more statutory aggravating factors are proved. Idaho Code §§ 18-4004; 19-2515. Sentence is imposed by the court without jury participation, and the sentencing judge is required by Idaho Code § 19-2515 to follow a particularized procedure in "all cases in which the death penalty may be imposed." Idaho Code § 19-2515(d). This procedure requires the court to hear all relevant evidence in aggravation and mitigation. "Evidence admitted at trial shall be considered and need not be repeated at the sentencing hearing." *Id.* If a statutory aggravating circumstance is found, the court is directed that it *shall* impose the death penalty unless there is sufficient mitigation to outweigh

the gravity of the aggravating factor. Idaho Code § 19-2515(c). The statute does not require the state to give notice that the death penalty will or will not be recommended. Moreover, it is a clear precept of Idaho law that sentencing is the sole responsibility of the judge, and his sentencing judgment may not be controlled by recommendations of the prosecuting attorney. *State v. Pierce*, 593 P.2d 392 (Idaho 1979); *State v. Colyer*, 557 P.2d 626 (Idaho 1976).

Idaho's judicial sentencing statute, Idaho Code § 19-2515, notified Lankford and his lawyer that the sentencer's duty to consider the death sentence would not be triggered by an act of the prosecuting attorney. When a jury is the sentencing authority, the jury must be instructed about the application of aggravating factors. *Maynard v. Cartwright*, 486 U.S. 356 (1988). It is the prosecutor who must seek such instructions and present argument in favor of the death penalty. If the prosecutor does not undertake to pursue the death penalty in a jury sentencing jurisdiction, there is no mechanism by which the death penalty issue can be tendered to the jury. In Idaho, by contrast, the judge is obligated to consider the death penalty irrespective of the wishes of the prosecuting attorney. Judges are presumed to know and to apply the law in making sentencing decisions. *Walton v. Arizona*, 110 S.Ct. 3047 (1989). The accused should not be entitled to close his eyes to these circumstances. The purpose and the nature of this statutory structure make clear that there was no justification for the defendant or his counsel to believe that the death penalty was no longer a part of the case merely because the prosecuting attorney did not recommend the death penalty.

By entrusting the sentencing court with the *obligation* to consider the death penalty in light of the facts, the state has attempted to insure that its statute does not result in the arbitrary imposition of death sentences. The Idaho legislature recognized that a sentence of death must be based on an assessment of factors relevant to the personal culpability of the defendant, *Eddings v. Oklahoma*, 455 U.S. 104 (1982). As a means to facilitate this aim it chose to insist that the sentencer consider all appropriate sentencing options.

The Idaho legislature could appropriately have concluded that to require notification of the prosecutor's intentions regarding the death penalty would draw attention from its chosen focus on the judge as the party solely responsible for sentencing. See *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990).

Nearly a decade ago, in the first case in which the Idaho Supreme Court interpreted Idaho Code § 19-2515, the court held that the statute gave constitutionally sufficient notice of the prospect of the death penalty as a punishment for first-degree murder, as well as notice of the aggravating factors that could apply:

> Not only does the statute so notify, but the record reflects that the court below made the sentencing possibilities abundantly clear to appellant more than once during the proceedings. . . . *Whether the state would urge the maximum penalty or not was immaterial to the question of adequate notice to appellant that it was possible.* . . .
>
> * * *
>
> . . . The statute clearly sets forth that one of the listed aggravating circumstances must be proved beyond a reasonable doubt, and must outweigh any mitigating circumstances shown, prior to imposition of death. Generally, it is apparent that there will be no surprise under the facts of any given case as to what potential aggravating circumstances are involved. Both defense counsel and prosecution who have participated in the earlier preliminary hearing and trial will ordinarily be well appraised and conversant with the facts and issues involved in the aggravation mitigation hearing. . . . *State v. Osborn*, 631 P.2d 187, 195 (1981) (emphasis added).[3]

Thus, petitioner approached his sentencing charged with the knowledge that Idaho law made him eligible for a sentence of death and that the prosecutor's recommendation was not binding on the sentencing authority.

Lankford had even more explicit notice of the death penalty risk than that afforded by Idaho law. He was notified at the arraignment that the death penalty was a part of the case; he was told by his lawyer that the death penalty was possible; his attempt to obtain a plea bargain that would insure him against the death penalty was

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[3] Petitioner suggests that the Idaho Supreme Court referred in *State v. Gibson*, 675 P.2d 33, 42 (1983) to notice that the state intended to seek the death penalty as a procedure "mandated in potential death penalty cases." This is not a fair reading of the court's holding in *Gibson*, where the court said, "We find that all of the procedures mandated in potential death penalty cases were followed," and then went on to list several factors that showed the death penalty was imposed without passion, prejudice or arbitrariness, including the fact that the statutory procedures were followed. Petitioner's interpretation of the case would necessitate a conclusion that *Gibson* is contrary to *Osborn* and Idaho Code § 19-2515.

rejected by the judge; and the court, before passing sentence, expressly advised Lankford and his counsel that the sentencing options included the death penalty, all without objection from the defendant or Ms. Fisher.

Due process calls for such protections as the particular factual situation demands. *Greenholz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979). Lankford was sentenced to death because he was a principal in the murders of Robert and Cheryl Bravence. Although petitioner did not strike the fatal blows with his own hand, he assisted his brother in doing so by subduing the Bravences with a shotgun. Lankford acted with the state of mind of one who killed, attempted to kill, or intended to kill, *Enmund v. Florida*, 458 U.S. 782 (1982), the necessary "intent" being shown by Lankford's own use of lethal force and his own obvious anticipation that his brother would use lethal force. *Tison v. Arizona*, 481 U.S. 137 (1987). Lankford was charged accordingly, and it should have been apparent to him and to his counsel that he would be liable under Idaho law for two convictions of murder in the first degree, potentially punishable by death, depending upon statutory considerations to be applied by the sentencing judge alone. *State v. Paradis*, 676 P.2d 31 (Idaho 1983); Idaho Code §§ 18-204, 18-4001, 18-4002, 18-4003, 19-2515.

Notwithstanding that Idaho Code § 19-2515 *requires* the sentencing court to give consideration to the death penalty whenever a statutory aggravating circumstance appears in the evidence, petitioner asks this Court to alter the Idaho statutory scheme by holding that whenever the prosecuting attorney makes a recommendation for a sentence less than death, an additional burden, not present

in the statute, falls upon the judge to give express notice to the defendant that he might follow the plain mandate of Idaho law. This is not a requirement of the Due Process Clause.

B. The Due Process Clause Does Not Require Giving Notice of Law

The sum of Lankford's argument is that in capital sentencing proceedings notice is particularly important to insure that the death penalty is not arbitrarily imposed, but is, instead, a reasoned response to the defendant's background and character and the nature of the crime. This unexceptionable proposition says little about Lankford's case.

The due process requirement of notice was intended to provide the defendant with knowledge of the issues framed by the state in its charging documents and the facts on which the state will rely to prove its case. Notice of the charges and of the evidence is necessary to permit the person charged to make a fair defense. *Gardner v. Florida*, 430 U.S. 349 (1977).

Notice of facts and of the issues that have been framed is, however, different from notice of rules of law that will be applied by the sentencing authority and notice of the factors of judgment upon which the sentencer may rely.

The notice requirements of the Due Process Clause apply to facts and to governing issues. Notice of *facts* that

may be important to the outcome of the case must necessarily be disclosed if the defendant is to have an opportunity to respond to evidence that may be central to a conviction or a sentence. Thus, in *Gardner, supra,* the sentencing judge violated the Due Process Clause by relying in part on confidential information from a presentence investigation report which was never disclosed to the defendant or to his counsel.

Similarly, *Re Oliver,* 333 U.S. 257 (1948), held that the defendant was denied due process when he was committed for contempt in a secret investigative proceeding on the basis of evidence of which he was not aware.

In *Satterwhite v. Texas,* 486 U.S. 289 (1988), the defendant was sentenced to death on psychiatric evidence obtained in an interview conducted without notice to the defendant's counsel and which involved the development of factual information that would be critical to sentencing determinations.

Lankford, however, was aware of all the facts upon which his conviction and sentence were founded. Indeed, Lankford responded to this evidence and is not in any position to contend that he was denied notice of crucial facts that would bear upon his conviction or sentence. The factual notice cases, therefore, do not establish that Lankford was deprived of due process of law. The court's due process rules cannot be divorced from the reasoning on which they are based. *See, Spaziano v. Florida,* 968 U.S. 447 (1987).

The Court's cases have also found it fundamental to due process of law that a party be informed of the *issues* framed against him. Accordingly, in *Cole v. Arkansas,* 333

U.S. 196 (1948), the Court held that the Due Process Clause requires that a party be informed of the specific charges brought against him and be given a chance to be heard in the trial of issues raised by those charges. In *Cole,* the defendants were charged with a violation of § 2 of a statute penalizing unlawful assembly and were convicted of only a violation of § 2. The state supreme court affirmed the conviction on the ground that § 1 of the act, dealing with the use of force and violence, had been charged and the defendants had been shown to have violated § 1. The state court's decision was disapproved by this Court on due process grounds because the defendants had not been informed that they would be penalized for offenses for which they had not been tried:

> No principle of procedural due process is more clearly established than that notice of the specific charge and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. [Citation omitted.] . . . It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. 333 U.S. at 201.

Obviously, an alteration of the charges at the appellate stage of criminal proceedings deprives the accused of a fair chance to respond. *Cf., Re Gault,* 387 U.S. 1 (1967) (a juvenile defendant was deprived of his right to respond where a juvenile petition was filed on hearing day without having been shown to the boy or his parents and the petition made no reference to the factual basis for judicial action).

The due process right to notice of the charges which had been framed was accorded to Lankford. He was charged by written information with offenses defined by Idaho law. The state's statutes defining and penalizing murder left no doubt of the issues upon which he was to be tried.

In *Dobbert v. Florida*, 432 U.S. 282 (1977), the trial judge, in accordance with Florida statutory procedure, imposed the death penalty even though the jury had recommended a life prison term. Dobbert claimed that a procedural change in Florida law was an *ex post facto* violation and that there was no death penalty in effect when the murder was committed because the statute which was current at that time was later invalidated. The Court held that "the existence of the statute served as an 'operative fact' to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder. This was sufficient compliance with the *ex post facto* provision of the United States Constitution." 432 U.S. at 298.

The notice requirement of the Due Process Clause has the same character. Its purpose is to inform the defendant of the legal issues which he must meet and the facts that will be laid against him.

Lankford cites a number of cases addressed to administrative decision-making for the theory that the opportunity to be heard on the issue of the death penalty was denied by Judge Reinhardt's asserted failure to give notice of his intent to consider the death penalty.

It is worth mention that administrative proceedings generally differ from criminal prosecutions in that they

involve official actions, not expressly defined, that leave the trier with a great deal of discretion. *See, Morgan v. United States*, 304 U.S. 1 (1938); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); and *Joint Anti-fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951). Cases which hold that due process is denied by administrative decisions taken in the absence of a definitive complaint, or otherwise without providing a fair opportunity to respond, have little bearing on Lankford's case.

It is more pertinent here that the Court has recognized that the sentencing court may resort to discretionary judgmental factors and may rely on principles of law without giving express notice of its intention to do so.

A sentencing judge does not violate the Due Process Clause by considering even such nonstatutory aggravating circumstances as his own experience with Nazi concentration camps in World War II when discussing the racial motive for a murder. *Barclay v. Florida*, 463 U.S. 939 (1983):

> Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the state entrusts an important judgment to decide in a vacuum, as if he had no experiences. * * *
>
> We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors. But to attempt to separate the sentencer's decision from his experiences would inevitably do precisely that. It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing. 463 U.S. at 950.

Lack of notice of standards by which evidence will be judged does not violate the Due Process Clause. Although a party is entitled to know the issues on which an administrative decision will turn, the rule does not encompass other kinds of factors affecting judgment. In *Bowman Trans., Inc. v. Arkansas-Best Freight*, 419 U.S. 281 (1974), it was asserted that carriers protesting applications of other carriers had deprived their opponents of notice of what would be considered in rendering judgment by submitting performance studies that postdated the notice of hearing. This Court distinguished between notice of governing facts and notice of such matters as the weight the trier might give to the evidence:

> The district court . . . ruled that since there had been no suggestion during the evidentiary hearings that performance studies subsequent to notice of hearing might not be reviewed as representative, the appellees had been denied fair notice of the standards by which their evidence would be judged. 364 F.Supp. 1239, 1260. We disagree. A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation. [Citation omitted.] But these salutary principles do not preclude a fact-finder from observing strengths and weaknesses in the evidence that no party identified. If the examiners had raised the qualifications to appellees' evidence the Commission later interposed, there would have been no basis for suggesting unfairness. [Citation omitted.] The situation is not altered by the fact that the Commission parted company with the examiners. . . . We perceive no reason for

> binding an agency to the experience and viewpoint of the examiner and the interpretation of studies in the record. 419 U.S. at 288, n.4.

The Court has held that factual findings related to sentencing may be made on review, obviously without specific presentence notice. *Cabana v. Bullock*, 474 U.S. 376 (1986); *Clemons v. Mississippi*, 110 S.Ct. 1441 (1990).

See also, Wainwright v. Goode, 464 U.S. 78 (1983).

Lankford's argument challenges the principles announced in the foregoing cases. In deciding that adherence to the law called for the death penalty, Judge Reinhardt did no more than exercise the judgment required of him by applying known legal standards to known facts. Unless the Court is to authorize the defendant to engage in a kind of practiced ignorance about what the sentencing judge is legally required to do, Lankford is not in a position to claim that he is entitled to relief because he did not have notice that the sentencing court would follow the Idaho sentencing statute.

Lankford's position, were it to prevail, would subject sentencing proceedings to unnecessarily arbitrary forces. Although the judge is required by Idaho law to exercise guided sentencing discretion, Lankford would make the prosecuting attorney's recommendation mean something more in the sentencing process than it should. Thus, if the prosecuting attorney recommends a sentence less than death, the judge must immediately commit to one of two courses of action: either to accept the recommendation or to announce that the death penalty is still possible. The judge would thereby be pressured to start toward or away from the death penalty even before evidence in

aggravation and mitigation has been presented. Idaho has chosen not to place the judge in this position and its choice is entitled to deference. *Walton, supra; Baldwin v. Alabama,* 472 U.S. 372 (1985). See also *Silagy v. Peters, supra.*

C. Lankford's Right to Assistance of Counsel Was Not Abridged By Lack of Notice

The Court held in *Strickland v. Washington,* 466 U.S. 668 (1984), that the right to effective assistance of counsel guards not only against deficiencies attributable to counsel but also against circumstances in which it is appropriate to presume that counsel's ability to represent the defendant has been compromised by government interference.

The Sixth Amendment issue, as framed here, is whether the lack of specific notice that the court intended to consider the death penalty interfered with Lankford's right to effective assistance of counsel, not whether the denial of a continuance had that effect. Presumably, petitioner claims that the lack of additional preparation time contributed in some way to counsel's asserted failure to appreciate that the death penalty might be imposed.

"[T]he right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *United States v. Cronic,* 466 U.S. 648, 658 (1984). A court therefore errs when it infers a violation of the Sixth Amendment from such

potentially nonaffective factors as the time afforded for investigation and preparation, counsel's experience, the complexity of issues, and the accessibility of witnesses. *Id. Cf., Avery v. Alabama,* 308 U.S. 444 (1940) (short time to prepare for trial of capital case did not alone justify conclusion of inadequate representation.)

The Court of Appeals for the Seventh Circuit held in *Silagy v. Peters,* 905 F.2d 986 (7th Cir. 1990), that "certain pretrial knowledge [of the possibility of a death sentence] is not required to protect a defendant's sixth amendment rights." 905 F.2d at 995. The court concluded that the interest of the defendant in developing a trial strategy based on advance notice of the state's intention to seek the death penalty is not protected by the Sixth Amendment.[4] Further, the court observed that the rule sought by the defendant would deprive the Illinois statute of some of its protection against arbitrariness.

Much of what Lankford describes as ineffective assistance attributable to lack of notice is in fact concerned with the court's refusal to continue the sentencing proceeding after Ms. Fisher replaced Mr. Longeteig as counsel. Lankford was personally responsible for this inconvenience because he insisted, without substantial

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[4] A dictum in *Silagy* states that "the sentencing authority's decision to *impose* a sentence of death under the Illinois statute clearly requires notice to the accused." In context, the comment appears to mean only that the defendant must be given such notice as affords an opportunity to respond. For the reasons offered herein, respondent contends that this requirement of due process was satisfied.

reason, on changing attorneys shortly before the sentencing proceeding, after the court and his trial counsel had made preparations to proceed. It is well settled that a party may not complain of error for which he is responsible. *United States v. Young*, 470 U.S. 1 (1985). *See also, Francois v. Wainwright*, 741 F.2d 1275 (11th Cir. 1984).

In any event, Lankford's counsel made a full presentation of mitigating evidence. Lankford's bad upbringing, his brother's violent influence, his own assertedly peaceable nature, the support of his friends and relatives, and his amenability to rehabilitation were all explored at length by favorable witnesses. It has not even been suggested that other mitigating facts could have been produced, or that there exists some variety of evidence that would have been mitigating in a capital proceeding but could have been safely ignored in a non-capital proceeding.

Lankford has not established that lack of notice that the court intended to consider the death penalty had any effect on counsel's performance or on the outcome of the case.

Finally, it must be stressed that the Idaho Supreme Court did not consider any issue related to the effect of lack of notice on the right to effective assistance of counsel. The matter was not raised on direct appeal, see *State v. Lankford*, 747 P.2d 710 (1987), and when Lankford attempted to raise the issue for the first time on this Court's remand, the Idaho Supreme Court held that a procedural forfeiture precluded it from reaching the claim. *State v. Lankford*, 775 P.2d 593 (1989). This issue

should not be considered by this court. *Street v. New York*, 394 U.S. 576 (1969).

CONCLUSION

The judgment of the Idaho Supreme Court should be affirmed. Lankford and his counsel are chargeable with knowledge of the potential for the death penalty upon a conviction for first-degree murder. Lankford is not entitled to close his eyes to the provisions of Idaho law requiring the sentencing judge to pass sentence by exercising his own judgment, not that of the prosecuting attorney.

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No. 88-7247

In The

Supreme Court of the United States

October Term, 1990

BRYAN STUART LANKFORD,

Petitioner,

v.

IDAHO,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Idaho

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Respondent's Brief does not and cannot dispute this crucial record fact: from the day the State filed its notice that it would not seek the death penalty until the close of the sentencing hearing, no one said anything suggesting that the death penalty was still available in this case. Everyone – including the prosecutor – plainly believed that the only issue remaining after the notice was filed was whether the defendant's life sentence would include the possibility of parole.

Even with the perspective of hindsight, Respondent can point to nothing in the record which gave defense counsel a clear and timely signal that she had to defend against a death sentence neither side wanted. The routine advisements to the defendant at arraignment came too early to clarify the dramatically different posture of the case months later, especially for a lawyer who never heard them. The trial judge's puzzling and awkward insertion of the words "or death" into his reflections at the end of the sentencing hearing (J.A. 114) came too late to change a defense case that had already been presented, even if counsel could have discerned their ominous significance.

These points are covered in our opening brief. App. Br. 40-2, 46. We will limit the remainder of our comments here to the new matters raised by Respondent.

1. The Failed Plea Bargain.

Respondent suggests that Judge Reinhardt's rejection of the parties' proposed plea bargain foreshadowed his intention to impose a death sentence. Resp. Br. 12. To the contrary, the rejected plea bargain served only to focus

the one issue everyone understood was unresolved at the time of sentencing: the possibility of parole upon a life sentence. Mr. Longteig, the defense lawyer at trial, testified that the plea bargaining discussions were entered into because "we were very concerned with a fixed term life as opposed to something else." J.A. 78. He had "told Mr. Lankford that he wouldn't get the death penalty" in any event. *Ibid.* Judge Reinhardt said explicitly that the parole issue was what prevented the plea bargain from going through:

> The point of it all is that Mr. Longteig and Mr. Albers, as indicated by the record, approached this Court and asked me to guarantee that Mr. Lankford would be guaranteed possibility of parole in ten years if he pled guilty to two counts of first degree murder. The court rejected that.

J.A. 86.

Far from suggesting there might still be a death sentence, the judge's rejection of the plea agreement served only to reinforce this impression: the issue on which the court was unwilling to be bound by the prosecutor's recommendation – and, therefore, the issue to be litigated at sentencing – was the possibility of parole. As the record clearly reflects, the arguments from both sides proceeded accordingly. J.A. 101-114.

2. The Law of Idaho in 1984.

In retrospect, Respondent's argument from the words of the Idaho statute seems plausible: Section 19-2515(d) does appear to require a penalty hearing in "all cases in

which the death penalty may be imposed." But a preceding subsection – Section 19-2515(a) – equally clearly appears to require "the oral or written suggestion of either party that there are circumstances which may properly be taken into view . . . in aggravation" and "such notice to the adverse party as [the court] . . . may direct." The latter section was the apparent source of the notice requirement the court imposed on the prosecution in this case. Defense counsel reasonably could, and plainly did, believe these statutes made the prosecutor's notice meaningful.

Certainly, nothing in Idaho's caselaw at the time told her the notice was not meaningful. The noncapital cases cited by Respondent for the proposition that a trial court's "sentencing judgment may not be controlled by recommendations of the prosecuting attorney" (Resp. Br. 17) said nothing of the kind.[1] Neither did *State v. Osborn*,

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[1] *State v. Pierce*, 100 Idaho 57, 593 P.2d 392 (1979), held that "it is not improper practice for the prosecution to make a sentencing recommendation." 593 P.2d at 393. *State v. Colyer*, 98 Idaho 32, 557 P.2d 626 (1976), is a guilty plea case that says nothing about the significance of prosecutors' sentencing recommendations. In addressing the validity of the defendant's guilty plea, however, the *Colyer* decision makes a comment that does seem quite pertinent here:

> At a minimum the record must show that appellant realized the possible maximum penalty which could be imposed. We cannot presume he possessed such knowledge. This is amply demonstrated by the fact that at the time sentence was imposed both the prosecuting attorney and appellant's counsel were mistaken as to the maximum sentence.

557 P.2d at 630.

102 Idaho 405, 631 P.2d 187 (1981) hold, as Respondent suggests, that a prosecutor's recommendation is meaningless. The argument rejected by the court in *Osborn* was that the State should "formally notify a defendant of the *particular aggravating circumstance* upon which it will rely." 631 P.2d at 196 (emphasis added). The *Osborn* opinion emphasized that, in that case, the court made "the sentencing possibilities abundantly clear . . . more than once during the proceedings," and the prosecution gave the defendant notice of "the evidence and arguments to be relied upon at the hearing" in support of a death sentence. 631 P.2d at 135-6. *Osborn* hardly could have notified defense counsel here that the death penalty could be imposed, without warning, where there *was* notice, given by court order, that the death penalty was *not* at issue.

Moreover, a second decision in the *Osborn* case, *State v. Osborn (II)*, 104 Idaho 809, 663 P.2d 1111 (Idaho 1983), rejected much the same argument the Respondent is making here: that the provisions of Idaho Code § 19-2515(c)-(e) are mandatory and must be strictly followed in every case, whatever the parties' position. *Osborne II* directly overruled an Idaho Court of Appeals' decision, *State v. Tisdale*, 103 Idaho 836, 654 P.2d 1389 (1982), which had "require[d] district courts to set forth in writing the reasons for imposing a particular sentence." 663 P.2d at 1112. Despite *Tisdale* – and despite sections 2515(d) and (e), which facially required written findings "in all cases in which the death penalty may be imposed" – the Court in *Osborn II* held: "while the setting

forth of reasons for the imposition of a particular sentence would be helpful, and is encouraged, it is not mandatory." *Ibid.*[2]

In short, in 1984 the law of Idaho on this subject was unsettled at best. No amount of study of that law, or the law of any other jurisdiction we can find, would have told defense counsel that the formal, court-ordered notice of the prosecutor's intentions in this case should have been ignored. Certainly nothing told defense counsel that the judge who had ordered that notice – and who, after receiving it, never indicated any intention to disregard it – would do so without prior warning.

3. The Requirements of Due Process.

Respondent echoes and expands upon the Idaho Supreme Court's citation of *Dobbert v. Florida*, 432 U.S. 282 (1977), for the proposition that there is no requirement of a "notice of law," because "[t]he enactments of a legislative body give legally sufficient notice of their contents. . . . " Resp. Br. 16. For that proposition Respondent cites *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). Although it is generally far afield from the precise issue here, the decision in *Texaco* included some observations about the due process principle of *Mullane v. Central Hanover Bank*

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[2] Although only two Justices signed the lead opinion in *Osborn II*, it was nonetheless binding precedent. *See State v. Nield*, 106 Idaho 665, 682 P.2d 618, 619 (1984), *reversing State v. Nield*, 105 Idaho 153, 666 P.2d 1164 (Ct. App. 1983).

& Trust Co., 339 U.S. 306 (1950), which answer Respondent's point:

> [In *Mullane*], the Court held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *id.*, at 314; the notice in *Mullane* was deficient "not because in fact it fail[ed] to reach everyone, but because under the circumstances it [was] not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.*, at 319.
>
> . . . . The due process standards of *Mullane* apply to an "adjudication" that is "to be accorded finality." The Court in *Mullane* itself distinguished the situation in which a State enacted a general rule of law. . . .

454 U.S. at 534-35; *see also id.* at 535-37.

The general statutory enactments upon which Respondent relies plainly were not "reasonably calculated" in this case to notify defense counsel that she had to "present [her] . . . objections" to a death sentence. The means of giving her that notice were ready at hand. As Respondent admits, the trial court could have either "accept[ed] the recommendation or . . . announce[d] that the death penalty is still possible." Resp. Br. 27. We are at a loss to understand Respondent's suggestion that such action would have detracted from the judge's impartiality in the case, any more than do the similar warnings regarding possible sentencing consequences required

since *Boykin v. Alabama*, 395 U.S. 238 (1969).[3] *See* Fed. Rule Crim. Pro. 11(e). Certainly, the infinitesimal cost of that announcement would have been more than repaid by the opportunity it would have given counsel to put on a meaningful case for her client's life. *Gardner v. Florida*, 430 U.S. 349, 359-60 (1977) (plurality opinion).

4. The Prejudice to Petitioner's Defense.

Respondent suggests that the fact that defense counsel put on no argument against the death penalty made no difference. Resp. Br. 28-30.[4] The Court rejected a very similar argument made by the State in *Gardner v. Florida*, saying:

> The argument rests on the erroneous premise that the participation of counsel is superfluous in the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth seeking function of trials requires us all to recognize the importance of giving counsel an opportunity to comment on

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[3] In notable contrast to this case, the trial judge in *State v. Osborn (I)* "made the sentencing possibilities abundantly clear- . . . more than once during the proceedings." 631 P.2d at 195.

[4] Respondent also suggests that the impact of a lack of notice on the defendant's right to effective assistance of counsel is not properly presented here. Resp. Br. at 30. That is incorrect. Petitioner's argument to the Idaho courts made the same basic factual points, and relied on *Gardner v. Florida*, which held that one of the ways in which "the sentencing process . . . must satisfy the requirements of the Due Process Clause" is in "the effective assistance of counsel." 430 U.S. at 358. *See* Pet. Reply to B.I.O. at App-A-7-9.

> facts which may influence the sentencing decision in capital cases.

Id. at 460 (plurality opinion).

The range of choices made by defense counsel – from her decision to take the case, to her agreement to have her client testify before the same trial judge in his brother's case, to her selection of what experts to consult and what witnesses to call, to her objections and arguments at the hearing itself – is incalculable. Every one of those choices rested on her belief that she was defending only against a fixed life sentence that could be imposed in the judge's discretion, not a sentence of death, ostensibly controlled by specific, and very different, legal standards. In such circumstances, the Court plainly cannot "affirm [the] . . . death sentence by speculating that his defense counsel might have made the same pretrial and trial decisions regardless of the sentencing scheme." *Coleman v. McCormick*, 874 F.2d 1280, 1289 (9th Cir. *en banc*), *cert. denied* 110 S.Ct. 349 (1989); *see also id.* at 1298 (concurring opinion of Judge Trott).

This case begins and ends with this unavoidable fact: The freakish circumstances here left Bryan Lankford with a lawyer who was unaware he was on trial for his life. That cannot comply with the Constitution.

Respectfully submitted,

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